SUPREME COURT
OF THE UNITED STATES

No. 09-11556

Title	Jose Tolentino, Petitioner v. New York
Docketed	June 25, 2010
Lower Ct	Court of Appeals of New York
Case Nos.	(37)
Decision Date	March 30, 2010

Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 23 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 26, 2010)
Jul 7 2010	Waiver of right of respondent New York to respond filed.
Jul 22 2010	DISTRIBUTED for Conference of September 27, 2010.
Aug 9 2010	Response Requested. (Due September 8, 2010)
Aug 31 2010	Order extending time to file response to petition to and including October 8, 2010.
Oct 7 2010	Brief of respondent New York in opposition filed.
Oct 21 2010	DISTRIBUTED for Conference of November 5, 2010.
Oct 22 2010	Reply of petitioner Jose Tolentino filed. (Distributed)
Nov 8 2010	DISTRIBUTED for Conference of November 12, 2010.
Nov 15 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 16 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 12, 2011.
Dec 16 2010	The time to file respondent's brief on the merits is extended to and including February 18, 2011.
Dec 16 2010	The parties have agreed that the reply brief on the merits will be filed on or before March 9, 2011.
Dec 23 2010	SET FOR ARGUMENT ON Monday, March 21, 2011.
Jan 12 2011	Joint appendix filed.
Jan 12 2011	Brief of petitioner Jose Tolentino filed.
Jan 14 2011	CIRCULATED.
Jan 19 2011	Brief amici curiae of Electronic Privacy Information Center, et al. filed. (Distributed)
Feb 4 2011	Record received from Court of Appeals of New York. (1 envelope)

Feb 18 2011 Brief of respondent New York filed. (Distributed)

Feb 22 2011 Record received from New York State Supreme Court. (1 envelope)

Feb 25 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Feb 25 2011 Brief amicus curiae of the United States filed. (Distributed)

Feb 25 2011 Brief amici curiae of New York State Association of Chiefs of Police, Inc., et al. filed. (Distributed)

Feb 25 2011 Brief amici curiae of Massachusetts, et al. filed. (Distributed)

Feb 25 2011 Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)

Mar 7 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Mar 9 2011 Reply of petitioner Jose Tolentino filed. (Distributed)

Mar 21 2011 Argued. For petitioner: Kristina Schwarz, New York, NY. For respondent: Caitlin J. Halligan, General Counsel, New York County District Attorney's Office, New York, NY; and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

Mar 29 2011 Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

09 11 556 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
FILED
JUN 23 2010
OFFICE OF THE CLERK

JOSE TOLENTINO,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

JOSE TOLENTINO, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Jose Tolentino respectfully petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York State Court of Appeals (Appendix A, A1-A7) has been officially reported at 14 N.Y.3d 382 (2010). The opinion of the New York State Supreme Court, Appellate Division, First Department (Appendix B, A8) has been officially reported at 59 A.D.3d 298 (1st Dept. 2009).

JURISDICTION

The New York State Court of Appeals entered its decision on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fourteenth Amendment to the United States Constitution provides, in relevant part, ". . . nor shall any State deprive any person of . . . liberty, . . . without due process of law."

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the New York Court of Appeals, affirming the New York Supreme Court denial of his motion for a Mapp/Dunaway hearing, where he sought to suppress Department of Motor Vehicle (DMV) records. Petitioner argued that his vehicle was stopped by the police for no apparent reason, and that the police exploited this illegality to perform a DMV record search that resulted in the discovery that petitioner's driver's license had been suspended and had not been reinstated. Accordingly, petitioner filed a motion in New York Supreme Court seeking the suppression of the DMV records as a remedy for the unlawful police conduct.

This motion was denied because the court found that DMV records are a type of identity-related evidence, and as such, are not subject to suppression. In support of this decision, the court cited this Court's decision in Immigration and

Naturalization Service (INS) v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). However, because this finding is based on a misreading of the Lopez-Mendoza case, and because the Federal Circuit Courts are divided regarding the applicability of the exclusionary rule to pre-existing identity-related government records accessed through police action violative of the Fourth Amendment,[1] petitioner seeks the review of this Court to clarify this area of the law.

MOTION FOR MAPP HEARING

As part of petitioner's omnibus motion, he moved to suppress his Department of Motor Vehicles ("DMV") records, and any testimony regarding such records, or, in the alternative, to direct the holding of a Mapp/Dunaway hearing (Appendix D, A12).

Before setting forth the factual basis for suppression, the motion stated that the defense had not been provided with any indication as to why petitioner had been stopped. All that the defense knew was that petitioner "was operating the motor vehicle in accordance with all posted traffic laws," and that he was "simply driving the car on a public road." (Appendix D, A19). The motion further elaborated that petitioner had not been driving "in an erratic, dangerous or

[1] Compare United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978) with United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

otherwise unlawful manner," that there was nothing "illegal about the condition of his automobile, and that he had not been "playing his radio at an unlawfully high volume (Appendix D, A25-A26).

The motion concluded that because petitioner's vehicle was "stopped without reasonable suspicion, probable cause, or any other legal justification," all evidence seized from petitioner as a result of the illegal seizure, including "his Department of Motor Vehicle ("DMV") records, and any testimony regarding such records as well as any tangible or testimonial fruits of his illegal seizure and search by police, including observations of the defendant by police," should be suppressed as the fruit of the illegality. The motion cited, inter alia, the Fourth and Fourteenth Amendments to the United States Constitution (Appendix D, A19-A20, A-25-A26).

The motion alleged that, without justification, the police stopped petitioner while he was driving a car, ordered him to turn over his driver's license, and conducted a computer check of petitioner's DMV records which revealed that his license was suspended and had not been reinstated. Subsequent to that, a Department of Motor Vehicles Abstract of Driving Record of petitioner was obtained from the Department of Motor Vehicles by the prosecution and filed with the court. Thus, the motion established that the prosecution obtained petitioner's

DMV records as a direct result of his unlawful seizure by the police (Appendix D, A21, A26).

The motion reasoned that petitioner's DMV records were suppressible as fruits of the police illegality because they were only accessible due to petitioner's unlawful seizure. The motion delineated that a vehicle must be stopped and the driver's name or license number must be obtained before DMV driving records can be generated, and that these records cannot be obtained by "observing the license plate of a car driving down the road." (Appendix D, A21, A24). Then, the motion further reasoned that "[a]lthough the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest," the records are nonetheless subject to suppression because the prosecution was only able to obtain these records "as a direct result of the defendant's illegal street stop and subsequent arrest" (Appendix D, A23-A24).

Relying on Davis v. Mississippi, 394 U.S. 721 (1969), Wong Sun v. United States, 371 U.S. 471, 485-86 (1963), and other relevant state cases, the motion asserted that it was a "general and well-established proposition" that the exclusionary rule is broadly applicable to any type of evidence – tangible or intangible – and that the controlling question is not what type of evidence is being sought to be suppressed, but rather, whether the evidence constituted, "fruits of illegal police conduct." (Appendix D, A22). The motion acknowledged that even

though cases such as INS v. Lopez Mendoza, 468 U.S. 1032 (1984) and United States v. Crews, 445 U.S. 463 (1980) have found in certain circumstances that "a defendant's body or identity cannot be suppressed as the fruit of an unlawful stop or arrest," this would not apply in the circumstances presented here because the DMV records sought to be suppressed "are not 'merely an extension of the defendant's identity.'" (Appendix D, A23).

The district attorney's response began by summarily asserting that petitioner had failed to dispute the factual basis for his stop, including that he had been playing loud music from his vehicle (Appendix D, A39). Then, the response went on to argue that "even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule" because they "were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested" (Appendix D, A39-A41).

On July 12, 2005, the court issued a written decision denying petitioner's Motion to Suppress Tangible Evidence or Mapp Hearing. The decision on this issue held in its entirety that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis " (emphasis in original). In support of this

decision the only Federal case the court cited was United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994), cert denied 513 U.S. 975 (1994) (Appendix C, A9-A10).

APPELLATE DIVISION DECISION

On February 24, 2009, the Appellate Division issued a written decision affirming the Supreme Court finding [Appendix B, A8; People v. Tolentino, 59 A.D.3d 298 (1st Dept. 2009)]. The decision disagreed with the lower court requirement concerning standing, holding that a defendant need not establish a privacy interest in "an alleged fruit of a preexisting violation of his or her Fourth Amendment rights."

Nonetheless, the court concluded that DMV records were not "suppressible fruits" because they were akin to the identity of the defendant himself, which it concluded was not suppressible. To support this ruling, the court cited Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) and United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994), cert denied 513 U.S. 975 (1994).

The court also held that the DMV records were not suppressible because they "were compiled independently of defendant's arrest." For this proposition, the court cited People v. Pleasant, 54 N.Y.2d 972, 973-974 (1981), cert denied 455 U.S. 924 (1982).

NEW YORK STATE COURT OF APPEALS DECISION

The majority opinion

By a vote of five to two, the Court affirmed the denial of suppression. The majority began its analysis with INS v. Lopez-Mendoza, concluding that that case stands for the well-settled proposition that the name or identity of an individual is never suppressible. As a result, the court concluded that the question to be addressed by this case was whether, "the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records." [Appendix A, A3; People v. Tolentino, 14 N.Y.3d 383, 385 (2010)]

The court examined federal circuit court decisions addressing the question whether pre-existing government immigration files are subject to suppression. However, the decision only cited those cases that conclude that pre-existing files are not suppressible, completely ignoring those circuit court decisions that find them subject to suppression. Compare United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978) with United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006);

United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

The decision relied on language from United States v. Crews, 445 U.S. 463, 475-477 and 475 n. 22 (1980 plurality op) ("[t]he exclusionary rule . . . does not reach backward to taint information that was in official hands prior to any illegality") to support its conclusion that pre-existing public records are not subject to suppression. The decision also looked to a New York state case, People v. Pleasant, 54 N.Y.2d 972 (1981) to support its finding that evidence already in the government's possession prior to the illegality is not suppressible when it is "obtained by the police from a source independent of the claimed illegal stop." Id. at 387.

Next, the court suggested that there was a policy rationale against applying the exclusionary rule to identity-related evidence. The court performed a balancing test, weighing the social costs of excluding identity-related evidence, which it characterized as "permitting defendants to hide their identity" and as "undermin[ing] the administration of the criminal justice system and essentially allow[ing] suppression of the court's jurisdiction," against the potential for deterrence of improper police conduct, and concluded that there were few deterrence benefits since "[other] evidence recovered in the course of an illegal stop remain[] subject to the exclusionary rule." Id. at 387.

Finally, the court attempted to harmonize its decision with this Court's decisions in Davis v. Mississippi, 394 U.S. 721, 724 (1969) and Hayes v. Florida, 470 U.S. 811, 815 (1985), where this Court authorized the suppression of fingerprint identity evidence. To do this, the New York court distinguished the defendants in Davis and Hayes from the defendant here because they were stopped in order that police could obtain evidence that was not pre-existing (fingerprints) and because the fingerprint evidence was being used to "establish[] defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here." Id. Because of these differences, the New York court concluded that their decision, essentially finding that pre-existing identity-related evidence is not subject to the suppression rule, was in harmony with Davis and Hayes and would not "alter the outcome" of those cases.

The dissenting opinion

Judge Ciparick, joined by Chief Judge Lippman, dissented, finding that DMV records "are subject to suppression if obtained by the police through exploitation of a Fourth Amendment violation, namely an unlawful traffic stop." (Appendix A, A5; Id. at 388). In coming to this conclusion, the dissent began its analysis by pointing out that the majority opinion rested on two principles, regarding both of which it was in disagreement. First, the majority had set forth a new rule, "that regardless of police conduct, DMV records obtained through a

police stop and inquiry of the driver are not subject to the exclusionary rule when the only link between the police conduct and the evidence is that the police learned a defendant's name." Secondly, the majority had concluded that DMV records are not subject to suppression because they are "government records compiled independently of defendant's arrest." (Appendix A, A5, Id.)

The dissent began its opinion by emphasizing that the law has long held that derivative evidence of any type obtained in violation of the Fourth Amendment must be suppressed as "fruit of the poisonous tree" if obtained through exploitation of illegal police conduct. The dissent pointed out that the majority decision was in effect excluding a specific category of evidence from the suppression rule, something that had never been done before.

The dissent found that the majority decision was flawed because it heavily relied upon a misreading of INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), to support its conclusion that identity evidence is not subject to suppression. The dissent found that the language from Lopez-Mendoza concerning "[t]he 'body' or identity of a defendant" never being "suppressible as a fruit of an unlawful arrest," referred only to the court's personal jurisdiction over an individual and not, as the majority concluded, to the admissibility of identity-related evidence.

The dissent explained that Lopez-Mendoza reviewed two civil deportation proceedings resulting from illegal police conduct. In the first case, Adan Lopez-

Mendoza raised a purely jurisdictional objection to having been summoned to a deportation proceeding following an unlawful arrest, he did not challenge the admissibility of evidence being proffered against him. In the companion case, Elias Sandoval-Sanchez challenged the introduction of illegally obtained evidence at his deportation proceeding.

The dissent pointed out that the "body" or "identity" language relied on by the majority to justify its position opposing the suppression of identity evidence came from the first portion of the Lopez-Mendoza case that dealt exclusively with the jurisdictional claim, and as such was not directly applicable. The dissent showed that the disputed language was actually a re-stating of an older jurisdictional rule set forth in Gerstein v. Pugh, 420 U.S. 103, 119 (1975) and Frisbie v. Collins, 342 U.S. 519, 522 (1952). Moreover, the dissent went on to show that the Lopez-Mendoza Court did not follow the same "identity rule" in the companion Sandoval-Sanchez case that raised a suppression claim, further establishing that this Court did not intend to exclude identity-related evidence from suppression claims in criminal proceedings. Additionally, the dissent cited cases from the Fourth, Eighth, and Tenth Circuits that all followed this interpretation of Lopez-Mendoza. See United States v. Oscar-Torres, 507 F.3d 224, 227-230 (4th Cir. 2007); United States v. Olivares-Rangel, 458 F.3d 1104, 1111-1112 (10th Cir.

2006); United States v. Guevara-Martinez, 262 F.3d 751, 753, 755 (8th Cir. 2001) (Appendix A, A5; Id. at 389).

The dissent agreed with the majority that a defendant's identity cannot be suppressed to defeat the personal jurisdiction of the court. However, the dissent emphasized that there was a clear difference between identity, for personal jurisdiction purposes, and identity-related evidence, that the dissent maintained was subject to suppression. In support of this, the dissent referred to the Davis and Hayes cases, where this Court found that fingerprint evidence was suppressible (Appendix A, A5; Id. at 389).

The dissenting opinion next turned to a discussion of public policy, emphasizing that the deterrent purpose of the exclusionary rule should equally apply to all evidence illegally obtained, whether or not it is identity-related; that the legality of the police conduct should be the focus of the inquiry, not the type of evidence obtained. Indeed, the dissent concluded that the majority opinion, excluding driving records from the pool of suppressible fruits, "gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police." (Appendix A, A6; Id. at 390).

Finally, the dissent addressed the majority's argument that DMV records are not subject to the exclusionary rule because they are compiled by a state agency

independent of any illegality, and concluded that this reasoning was faulty because it, "ignores that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop." The dissent emphasized that the New York state case the majority relied on to justify this finding, People v. Pleasant, 54 N.Y.2d 972, 974 (1981), actually was not premised on a finding that the evidence was not suppressible because it was already in the possession of the government, as the majority wrongly concluded, but was instead decided through the application of a classic attenuation analysis, which necessarily meant that the court had not categorically excluded government records from the list of potentially excludible evidence (Appendix A, A6; Id. at 390-391). Accordingly, the dissent urged a remand for a Mapp/Dunaway hearing, in order to conduct an attenuation analysis to determine whether the DMV records should be suppressed (Appendix A, A6; Id.).

REASONS FOR GRANTING THE PETITION

This Court should take this case since the Federal Circuit Courts are divided as to the applicability of the exclusionary rule to pre-existing identity-related documents maintained by the government. Central to resolving this split, is an examination of this Court's decision in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

When the police stop a moving vehicle, a seizure of the car and its occupants within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution has occurred. Delaware v. Prouse, 440 U.S. 648 (1979). Such a seizure is proper only if the officers have at least a reasonable suspicion that the car was used in criminal activity or that its occupants were committing, had committed or were about to commit a crime. Id.

As a general rule, evidence obtained as a result of an unlawful stop must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule of the Fourth Amendment applies not only to physical evidence immediately seized, but also to "secondary" or "derivative" evidence. Wong Sun v. United States, supra, 371 U.S. 471, 487-488 (1963); see generally 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, pp. 255-258 (4th Ed., 2004).

This Court has held that nearly every category of evidence is subject to suppression as "fruits" or "derivative evidence" of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the initial police illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Wong Sun, supra, 371 U.S. at 488. See, e.g., Sibron v. State of New York, 392 U.S. 40 (1968) ("fruits" held to include both tangible and intangible evidence); Davis v. Mississippi, 394 U.S. 721 (1969) ("fruits" held to include

evidence of defendant's fingerprints); United States v. Giordano, 416 U.S. 505 (1974) ("fruits" held to include objects discovered inadvertently and words overheard); Dunaway v. New York, 442 U.S. 200 (1979) ("fruits" held to include statements and confessions); United States v. Crews, 445 U.S. 463 (1980) ("fruits" held to include pre-trial identifications made as a product of an unlawful arrest).

In Wong Sun, this Court articulated the basic rule for deciding whether evidence derived from an illegal search should be suppressed: "[T]he [] question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, supra, 371 U.S. at 488 (quoting, Maguire, Evidence of Guilt, 221 (1959)). The fruit of the poisonous tree doctrine articulated in Wong Sun, rests on a public policy decision to preclude the use of evidence which flows directly from illegal police action. The rationale behind the policy is that the best way to curb illegal police conduct is to prevent the police from benefiting from their illegal conduct.

In Wong Sun, this Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light **but for** the illegal actions of the police." Wong Sun, supra, 371 U.S. at 487-488 (emphasis added). Because the exclusionary rule was created to deter the government from

performing illegal actions, where there was only an "attenuated connection" between the Fourth Amendment violation and certain derivative evidence, this Court concluded that the deterrent effect would be negligible and suppression was not warranted. Id. at 487.

Thus, where the challenged evidence is a direct product of the illegality and a motivating force behind the illegal actions, suppression is required, but where the evidence is so removed from the illegal actions of law enforcement as to be an improbable motivating force behind the illegality, then the evidence is deemed too "attenuated" to require suppression. See Wong Sun, supra, 371 U.S. at 491; Nardone v. United States, 308 U.S. 338, 341 (1939).

In his well-respected treatise on search and seizure law, Professor LaFave articulated three factors as relevant to attenuation analysis:

> (1) "Where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by 'sophisticated argument,' exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation."
>
> (2) The same may be said where evidence "is used for some relatively insignificant or highly unusual purpose. Under these circumstances it is not likely that, at the time the primary illegality was contemplated, the police foresaw or were motivated by the potential use of the evidence and the threat of exclusion would, therefore, effect no deterrence."

(3) "Since the purpose of the exclusionary rule is to deter undesirable police conduct, where that conduct is particularly offensive the deterrence ought to be greater and, therefore, the scope of exclusion broader." 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, p. 260 (4th Ed., 2004) (citations and footnotes omitted).

Under the standards governing "fruit" and attenuation doctrine, the DMV records at issue here were "come at by exploitation of" his illegal stop, see Wong Sun, supra, 371 U.S. at 488, and thus are suppressible fruits. The test for determining whether a Fourth Amendment violation requires the suppression of seized evidence requires a determination of whether the evidence was "come at by exploitation of that illegality." Wong Sun, supra, 371 U.S. at 488. Clearly petitioner's claim for suppression arises from the exploitation of his unlawful stop. Petitioner's motion sets forth that there was no reason his car should have been singled out and stopped. The police exploited this illegality by eliciting identity information from him and then immediately exploiting that information by gaining access to his driving record and thereby learning he had a suspended license. In other words, the knowledge of defendant's suspended license was "come at by exploitation of the unlawful police action."

This case is a classic example of the police benefiting from the exploitation of their illegal actions – the prevention of which is the very reason the exclusionary rule exists. Indeed, this case is indistinguishable analytically from other cases that resulted in suppression following an unlawful arrest. See e.g., United States v.

Crews, supra, 445 U.S. 463 (pre-trial photographic and line-up identification procedures suppressed as "fruit" of unlawful arrest). Moreover, as we demonstrated on page 15 above, this Court has repeatedly held that the exclusionary rule of the Fourth Amendment applies not only to physical evidence, but to a wide range of other types of evidence. Knowing that suppressible evidence can be virtually anything of an evidentiary nature gleaned from a Fourth Amendment violation, DMV records easily fall within the ambit of evidence subject to the exclusionary rule.

The Wong Sun rule provides that evidence should not be suppressed if it is come at "by means sufficiently distinguishable [from the illegality] to be purged of the primary taint." Wong Sun, supra, 371 U.S. at 488. Thus, when evidence is elicited by the police "merely as part of a routine booking procedure," the rule holds that it is not subject to suppression; whereas when the same type of evidence is elicited in order to investigate criminal activity, then it can be subject to suppression. United States v. Olivares-Rangel, 458 F.3d 1104, 1120-1121 (10th Cir. 2006); United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001).

In Olivares-Rangel, the police illegally stopped defendant's vehicle and obtained an admission from him that he was a Mexican citizen and in the United States illegally. Defendant was arrested and taken to the border patrol station

where he was fingerprinted and asked about his biographical information. This information led the police to access the record of petitioner's criminal conviction and his prior deportation. On appeal, the 10th Circuit reasoned that "previously compiled Government records" were suppressible where the evidence was obtained through "exploitation of an illegal search and seizure [that] produced the critical link between a defendant's identity and his immigration or prior criminal history record." Olivares-Rangel, supra, 458 F.3d at 1120.

The 4th Circuit in Oscar-Torres, supra, 507 F.3d 224 directly addressed this issue as well. There, the court held that the record of defendant's criminal conviction and his prior deportation which were recovered after the defendant's illegal car stop would be suppressible if the law enforcement officers were motivated by an investigative purpose in obtaining the evidence; but the evidence would not be suppressible if it was obtained for and motivated by an administrative purpose; and finally, the evidence would be suppressible if both an investigative and administrative purpose motivated the illegal arrest and fingerprinting. Id. at 232.

In this case, the motive behind the unlawful car stop and the request for petitioner's name and driver's license information was to investigate possible criminal activity, as evidenced by the fact that the police immediately entered the driver's license information into the police computer system to investigate

petitioner's driving record. Since the records were not obtained merely as an administrative task or in such a way as to dissipate the taint of the Fourth Amendment violation, they must be found to be a direct product of the exploitation of the unlawful car stop, and thus subject to the suppression rule. Olivares-Rangel, supra, 458 F.3d at 1113-1117; Oscar-Torres, supra, 507 F.3d at 230-232. Thus, for sound policy reasons, this case falls within the range of cases subject to the exclusionary rule, and a suppression hearing should have been ordered.

Yet, the New York State Court of Appeals concluded that DMV records were not suppressible fruits because "identity" is not a suppressible fruit. In reaching this conclusion, the Appellate Division relied upon language from this Court's decision in INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984), that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." However, as many other courts have recognized, a careful reading of this case demonstrates that this language refers to a court's personal jurisdiction over an individual who has been unlawfully arrested rather than to the "more substantial" claim that identity evidence can be subject to suppression as fruit of an unlawful arrest. These cases explain that there is a clear distinction between a court's jurisdiction over a

defendant's person and derivative evidence, such as DMV records, which are the object of the suppression motion here.

In Lopez-Mendoza, this Court held that the exclusionary rule did not extend to civil deportation proceedings. In coming to this conclusion, the Court addressed the claims of two individuals, Lopez-Mendoza and Sandoval-Sanchez. Lopez-Mendoza claimed his arrest was illegal and objected to his compelled presence at his civil deportation proceeding; however, Lopez-Mendoza never sought suppression of any evidence: "At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest, he entered no objection to the evidence offered against him." Lopez-Mendoza, supra, 468 U.S. at 1040. The argument raised by Lopez-Mendoza was that the fact of his illegal arrest deprived the immigration court of personal jurisdiction over him. Thus, when the Court stated that "the 'body' or identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest," it was in the context of addressing the court's jurisdiction over Lopez-Mendoza and not in the context of addressing a suppression issue.

Immediately after making the statement exempting "body" or "identity" from suppressible fruit, the Court cited three cases to support this proposition, all of which concern a court's jurisdiction to prosecute the defendant. Gerstein v. Pugh, 420 U.S. 103 (1975) ("Nor do we retreat from the established rule that

illegal arrest or detention does not void a subsequent conviction"); Frisbie v. Collins, 342 U.S. 519 (1952) ("This Court has never departed from the rule . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'"); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923) ("irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law").

This intentional distinction was highlighted by the later discussion by the Court of Sandoval-Sanchez's claim: "Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." Lopez-Mendoza, supra, 468 U.S. at 1040. However, after making this statement concerning Sandoval-Sanchez's "more substantial claim," this Court did not reach the suppression issue being raised because instead, it held that the exclusionary rule was inapplicable to civil deportation proceedings, mooting out Sandoval-Sanchez's claim for suppression of his statements. Lopez-Mendoza, supra, at 1050.

This interpretation of the Lopez-Mendoza case has been cited with approval by numerous courts and other authorities. See, e.g., United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006) ("Lopez-Mendoza does not prevent the suppression of all identity-related evidence. Rather, Lopez-Mendoza merely

reiterates the long-standing rule that a defendant may not challenge a court's jurisdiction over him or her based on an illegal arrest"); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001) (finding that the "identity" language in Lopez-Mendoza referred only to jurisdictional challenges and did not foreclose suppression of all identity related evidence); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007) (same); United States v. Juarez-Torres, 441 F.Supp.2d 1108, 1116-1120 (D. New Mexico 2006) (same).

The court in Olivares-Rangel aptly summarized this correct interpretation of Lopez-Mendoza:

> Seeking to suppress one's very identity and body from a criminal proceeding merely because of an unconstitutional arrest is the sort of jurisdictional challenge foreclosed by Lopez-Mendoza. The language in Lopez-Mendoza merely says that the defendant cannot suppress the entire issue of his identity. A defendant may still seek suppression of specific pieces of evidence (such as, say, fingerprints or statements) under the ordinary rules announced in Mapp and Wong Sun. A broader reading of Lopez-Mendoza would give the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose was limited to establishing a defendant's identity. We do not believe the Supreme Court intended Lopez-Mendoza to be given such a reading. Olivares-Rangel, supra, 458 F.3d at 1111.

However, the New York Court of Appeals chose to rely on other Federal cases, grounded in a misreading of the Lopez-Mendoza case, in order to defeat suppression. See United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United

States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999), United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994). All of these cases fail to note that the "body" or "identity" language in Lopez-Mendoza refers only to a court's jurisdiction over the person, rather than the suppression of evidence. Indeed, the Guzman-Bruno case, was relied on heavily by the New York Court of Appeals, for its statement that "there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file," yet that statement is simply a misapplication of Lopez-Mendoza. Professor LaFave advises against reliance on this interpretation in the most recent update to his treatise on search and seizure law, stating that, "some of the reasoning in Guzman-Bruno is open to serious question, for it appears to be grounded in a misreading of the quoted case, INS v. Lopez-Mendoza." 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, 2009-2010 Pocket Part, p. 62 (4th Ed.).

Based on the above-stated explanation, the New York courts were wrong in concluding that petitioner's driving records were not suppressible. The reasons given in their decisions for finding the driving records exempt from suppression were primarily based upon their erroneous reading of Lopez-Mendoza. The courts simply failed to recognize that the "body" or "identity" language in Lopez-

Mendoza was a restatement of an established jurisdictional rule and was not meant to prohibit the suppression of identity-derived evidence.

Indeed, although this Court has not directly addressed the issue raised by this case concerning pre-existing government identity-related records, it has addressed the question of the suppressibility of fingerprint evidence, a type of identity-related evidence, obtained after an illegal arrest, and concluded that it may be suppressed under the exclusionary rule if obtaining the fingerprints was the objective of the illegal arrest. Davis v. Mississippi, 394 U.S. 721, 727 (1969); Hayes v. Florida, 470 U.S. 811, 815 (1986).

The other issue to be addressed by this case is the validity of the proposition that the DMV records are not subject to the exclusionary rule because they were compiled by a state agency independent of the police illegality, suggesting that they are not the product of exploitation of the initial illegal seizure. Moreover, this erroneous holding ignores the fact that the police located petitioner's records only by relying on information that they obtained because of the illegal car stop. While it is true that knowledge of evidence obtained lawfully and independently of the initial illegality is not properly considered "fruit" of a Fourth Amendment violation, "the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Silverthorne Lumber Co. v. United States, supra, 251 U.S. at 392. Evidence always exists independently of any illegality. But, the

exclusionary rule must be applied when an illegality is exploited to discover the existence of the incriminating evidence. Thus, even though petitioner's DMV records were available in computerized form prior to the illegal seizure, the unlawful car stop was exploited to link the defendant to the incriminating evidence. The question becomes not whether the DMV records existed prior to the initial illegality, but rather whether the knowledge of the facts of petitioner's crime were discovered through exploitation of the police illegality, as was done here. United States v. Juarez-Torres, supra, 441 F.Supp.2d at 1121.

Indeed, this question exposes yet another division among the Federal courts that can only be harmonized by this Court. This Court should take this opportunity to uphold the reasoning of the Fourth, Eighth, and Tenth Circuits and address the flaws of the Third, Fifth, Ninth and Eleventh Circuits. Compare, United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006) with United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978); United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009).

The courts in both Olivares-Rangel and Oscar-Torres acknowledged that pre-existing immigration and criminal record files would be suppressible if obtained through investigative exploitation of the illegal arrest, even though this type of evidence was already in the government's possession. United States v. Oscar-Torres, supra, 507 F.3d at 232 ("We remand for the district court to determine whether . . . both investigative and administrative purposes motivated the illegal arrest and fingerprinting, in which case the fingerprint **and attendant record evidence** must be suppressed.") (emphasis added); United States v. Olivares-Rangel, supra, 458 F.3d at 1121 ("Because the officers used Defendant's fingerprints to obtain his A-file, if those fingerprints are determined to be suppressible as fruits of the poisonous tree, then it follows that the A-file should also be suppressed.").

The fundamental policy basis behind the exclusionary rule is that only evidence that "has been come at by exploitation" of illegal police action is "fruit of the poisonous tree" and subject to suppression. Wong Sun, supra, 371 U.S. at 488. The emphasis is on determining whether the illegal police operations were spurred on by the promise of obtaining the subject evidence, in which case the evidence may be subject to the exclusionary rule. In these circumstances, a proper attenuation analysis must include a determination of whether the illegally-obtained evidence was gained for investigatory purposes or for purely administrative

purposes. United States v. Oscar-Torres, supra, 507 F.3d 224; United States v. Olivares-Rangel, supra, 458 F.3d 1104.

A police car stop – under any circumstances – is a stressful, unpleasant experience. When it occurs without reasonable justification, it becomes a quintessential example of the type of governmental action the Fourth Amendment was designed to eliminate. Yet, with the new rule in place as advanced by the New York Court of Appeals, the police have virtually no incentive to stop performing illegal stops. "Fishing expedition" car stops, under the new rule, will either uncover motorists without valid driver's licenses, who cannot complain that the stop was violative of the Fourth Amendment, or they will inconvenience motorists with valid driver's licenses who will be relieved to be allowed to leave without a ticket. In either event, the police will not receive any disincentive for performing the illegal stops, and will be motivated to conduct illegal stops as a tool to investigate motorists' driving records.[2] Allowing the police carte blanche to benefit from such intrusive investigatory practices, contradicts the very purpose behind the exclusionary rule.

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[2]In situations where police uncover both an unlicensed driver and contraband during a vehicular stop, if the exclusionary rule prohibits the introduction of the contraband but allows in the DMV records, thereby limiting the prosecution of the case to the unlicensed offense, the motivation to continue illegally stopping vehicles is not diminished in any way because the offense that remains, unlicensed operation of a motor vehicle, is a serious offense, in and of itself, with harsh penalties and other collateral consequences associated with it. Law enforcement officers would still conclude that unlawful car stops were worth exploiting.

This public policy concern was summarized by the Federal District Court of New Mexico:

> If police are free to detain and question anyone they want in order to obtain the person's identity, without fear of the exclusionary rule, they may be tempted, even in the absence of reasonable suspicion, to single out people of certain ethnic backgrounds for questions. United States v. Juarez-Torres, supra, 441 F.Supp.2d at 1122.

In sum, petitioner's request for a writ of certiorari should be granted so that this Court can properly address the issues outlined above. This Court should take this opportunity to reaffirm its holding in INS v. Lopez-Mendoza, explain the jurisdictional ramifications of the "body" or "identity" language in that case, and insert clarity into the question whether DMV records and other pre-existing government-compiled documents accessed by the police and utilized to justify an arrest should be considered suppressible "fruit" of unlawful police action violative of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONFERENCE
NOV - 5 2010

JOSE TOLENTINO,

Petitioner,

- versus -

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the exclusionary rule applies to preexisting government records obtained after an allegedly unlawful traffic stop, where the only link between the two is that the police learned the petitioner's identity as a result of the stop?

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 14 N.Y.3d 382, 926 N.E.2d 1212. Pet. App. A1-A7. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 59 A.D.3d 298, 873 N.Y.S.2d 602. Pet. App. A1-A7. The opinion of the Supreme Court of the State of New York, New York County is unreported. Pet. App. A9-A10.

JURISDICTION

The New York Court of Appeals rendered its decision on March 30, 2010. The petition was filed on June 22, 2010. Petitioner properly invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On January 1, 2005, several New York City police officers stopped petitioner, who was driving in Manhattan, for playing his music too loudly. They ascertained his identity and ran a computer check of petitioner's New York State Department of Motor Vehicles ("DMV") records. That check revealed that petitioner's license had been suspended, and that he had received at least ten suspensions on at least ten different dates for failure to answer a summons or pay a fine. Petitioner was charged with one count of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. See N.Y. Veh. & Traf. Law § 511(3)(a)(i).

Petitioner moved to suppress his DMV records and statements he made after his arrest as, inter alia, the product of an unlawful police stop of his vehicle.

Alternatively, petitioner requested that the court hold a Mapp hearing[1] on these motions. Pet. App. A12. In his motion, petitioner noted that the felony complaint alleged that an officer had conducted a computer check of his DMV records, which revealed that his license had been suspended. As a general matter, "[t]he steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number." Pet. App. A21. While acknowledging that DMV records are public records that existed in computerized form prior to his arrest, see Pet. App. A23, petitioner claimed that the police would not have obtained his DMV records "[b]ut for his unlawful seizure by the police . . . and they are therefore the fruit of the police illegality." Pet. App. A21.

The People opposed petitioner's motion on two grounds: first, that the officers' stop of petitioner was lawful, and second, that even if petitioner had been stopped illegally, the exclusionary rule had no application. Pet. App. A39-A42. With regard to the second point, the People argued that the Fourth Amendment imposes no sanction when an unlawful stop leads to discovery of a person's identity, which in turn leads to pre-existing official records. Pet. App. A39-A42.

While allowing a hearing on whether to suppress statements made by petitioner at the time of the stop, the trial court denied petitioner's request for a suppression

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[1] A Mapp hearing is conducted to determine whether evidence was obtained as a result of a Fourth Amendment violation, and thus must be suppressed under the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643 (1961).

hearing regarding the DMV records.[2] The court concluded that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a fruit of the poisonous tree analysis." Pet. App. A9-A10.

On August 3, 2005, petitioner pled guilty to Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, which was the sole count in the indictment. He entered this plea before any hearing could be held on his motion to suppress his statements. On September 28, 2005, he was sentenced to five years probation.

Petitioner's subsequent appeal of the order denying his motion to suppress the DMV records was rejected.[3] Before New York's intermediate appellate court (the Appellate Division, First Department), petitioner claimed, inter alia, that the trial court had erred in holding that the exclusionary rule had no application to DMV records, and he sought a remand for a hearing on his motion to suppress those records. The Appellate Division unanimously affirmed. Pet. App. A8. The court recognized that "a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights." Pet. App. A8. With respect to the

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[2] Under New York's criminal procedure law, a court may deny a suppression motion without a hearing if the motion papers do not allege a legal basis for suppression. See N.Y. Crim. Proc. Law § 710.60(3)(a).

[3] New York's criminal procedure law allows a defendant to appeal a final order denying a motion to suppress evidence, "notwithstanding the fact that such a judgment is entered upon a plea of guilty." N.Y. Crim. Proc. Law § 710.70(2).

scope of the "fruits" doctrine, the Appellate Division held that "DMV records are not suppressible fruits." Pet. App. A8. In INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984), the Court stated that "[t]he identity of a defendant is never itself suppressible as a fruit of an unlawful arrest." Thus, the court concluded, "'there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file'" Pet. App. A8 (quoting United States v. Guzman-Bruno, 27 F.3d 420, 422 [9th Cir. 1994] [internal citations omitted]). The court also found it significant that the DMV records had been compiled independently of petitioner's arrest. Pet. App. A8.

The New York Court of Appeals affirmed. The state high court noted that petitioner did not contend that his name or identity could be suppressed as the fruit of an allegedly unlawful stop. Rather, he claimed that the DMV records could be suppressed because absent an illegal stop, the police would not have learned petitioner's name and would not have been able to obtain the records. Pet. App. A3. The court examined federal circuit court decisions holding that the exclusionary rule has no application when the police unlawfully stop someone, learn his name, and use that name to check preexisting government immigration records. See id. (citing United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 [11th Cir. 2009]; United States v. Bowley, 435 F.3d 426, 430-31 [3d Cir. 2006]; United States v. Roque-Villanueva, 175 F.3d 345, 346 [5th Cir. 1999]; Hoonsilapa v. INS, 575 F.2d 735, 737 [9th Cir. 1978]). Relying on these decisions, as well as this Court's decision in Lopez-Mendoza,

the New York high court held that petitioner's DMV records were not subject to suppression as fruits of a purportedly unlawful stop. Pet. App. A3.

The Court of Appeals found further support for its holding in United States v. Crews, 445 U.S. 463 (1980). See Pet. App. A3. In Crews, a plurality of the Court held that "'[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.'" Pet. App. A3 (quoting Crews, 445 U.S. at 475). DMV records, the New York high court reasoned, like other preexisting records already in possession of the government, are not subject to suppression. Pet. App. A3.

In addition, the Court of Appeals distinguished this case from Davis v. Mississippi, 394 U.S. 721 (1969), and Hayes v. Florida, 470 U.S. 811 (1985), on two distinct grounds. First, the defendants in those cases, unlike petitioner, were illegally stopped for the purpose of obtaining fingerprints, which were not preexisting, to connect them to crimes under investigation. Second, the fingerprints were used to establish the defendants as perpetrators of a crime, not merely to establish the identities of the individuals stopped by the police. Pet. App. A4.

Lastly, the court reasoned that its ruling would not give the police an incentive to illegally stop, detain and search individuals. Because any evidence recovered in the course of such a stop is still subject to the exclusionary rule, the court explained, the police would be sufficiently deterred from conducting illegal car stops. Pet. App. A4.

Two judges dissented, arguing that DMV "records are subject to suppression if obtained by the police through the exploitation of the Fourth Amendment violation." Pet. App. A5.

ARGUMENT

This case presents the narrow question of whether pre-existing government documents—here, DMV records—are subject to suppression, where police learn the identity of a driver through an allegedly unlawful traffic stop, and then procure his DMV records. The New York Court of Appeals correctly held below that the exclusionary rule has no application in this context, and petitioner offers no legitimate reason for this Court to review that decision. Accordingly, the petition for certiorari should be denied.

Petitioner points this Court to a purported split among the federal courts on the applicability of the exclusionary rule to fingerprints and related evidence used to establish a defendant's immigration status. See Pet. 23-25, 27. However, any division among the courts on the issue is not implicated here. See Point I, infra. All of the cases cited by petitioner involve fingerprints (and in some instances other types of evidence) that are obtained in the course of an unlawful search and seizure, and later used in a criminal proceeding brought under 8 U.S.C. § 1326.[4] While the decisions cited by petitioner discuss the import of this Court's decision in INS v. Lopez-

[4] 8 U.S.C. § 1326 makes it a crime to be present in the United States after having been previously deported.

Mendoza, they do so in the context of a specific type of evidence and a specific criminal statute, neither of which is at issue in the decision below.

With respect to the question that was actually decided below, the New York Court of Appeals reached the correct result. See Point II, infra. Lopez-Mendoza suggests that a defendant's identity cannot be the subject of suppression in any circumstance. See 468 U.S. at 1039-40. Precedent that predates Lopez-Mendoza, in particular United States v. Crews, 445 U.S. 463, confirms this principle.

Finally, this case provides a poor vehicle for resolving any issues regarding the scope of the exclusionary rule. See Point III, infra. Although the People argued before the trial court that the stop of petitioner's car was indeed lawful, the trial court did not address this point. Even if this Court were to grant certiorari and rule in petitioner's favor on the legal question presented here, a remand would be required to determine the legality of the stop. If the traffic stop was found to be lawful, as is likely, then petitioner's DMV records would not be subject to suppression in any event.

I. To the extent that there is a split among the federal circuit courts, it is not implicated in this case.

Petitioner claims that the federal circuit courts are divided "as to the applicability of the exclusionary rule to pre-existing identity-related documents

maintained by the government." Pet. 14. To the extent petitioner has identified a valid split, however, it is not implicated here.

According to petitioner, the Fourth, Eighth, and Tenth Circuits have held that "identity-related" evidence is subject to suppression,[5] while the Third, Fifth, Ninth, and Eleventh Circuits have reached the opposite result. See Pet. 23-25 (comparing United States v. Oscar-Torres, 507 F.3d 224 [4th Cir. 2007]; United States v. Guevara-Martinez, 262 F.3d 751 [8th Cir. 2001]; and United States v. Olivares-Rangel, 458 F.3d 1104 [10th Cir. 2006], with Bowley, 435 F.3d at 426; Roque-Villanueva, 175 F.3d at 345; Guzman-Bruno, 27 F.3d at 420; and Farias-Gonzalez, 556 F.3d at 1181).[6]

None of these cases, however, are directly on point. The decisions cited by petitioner all address the applicability of the exclusionary rule to fingerprint evidence, and in some cases other types of evidence, obtained from undocumented immigrants

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[5] While focusing on a purported split among the circuits, petitioner also cites United States v. Juarez-Torres, 441 F.Supp.2d 1108 (D. N.M. 2006). There, the district court set forth a view regarding the scope of the exclusionary rule that is arguably at odds with the one adopted by the court below. However, Juarez-Torres, unlike the case at issue here, concerns a prosecution under 8 U.S.C. § 1326. In any event, a difference of opinion between a single district court and a state court does not warrant review by this Court. See Supreme Court Rule 10(b).

[6] Petitioner fails to cite the Sixth Circuit's holding that under Lopez-Mendoza, a defendant's identity is not suppressible. See United States v. Navarro-Diaz, 420 F.3d 581, 588 (6th Cir. 2005). Additionally, while the Ninth Circuit has more recently suggested that in some instances fingerprints obtained after an unlawful arrest may be subject to suppression, it has otherwise stood by the general principle that evidence relating to a defendant's identity is not suppressible as fruit of the poisonous tree. See United States v. Garcia-Beltran, 443 F.3d 1126, 1131-35 (9th Cir. 2006).

who are charged with violating 8 U.S.C. § 1326, which criminalizes presence in the United States following deportation.

At issue in this line of cases is not whether mere identity is suppressible, or even whether pre-existing evidence is suppressible because it was located merely by learning a defendant's identity, but rather whether fingerprint evidence generated only after, and as the result of, improper police behavior can be suppressed. See Oscar-Torres, 507 F.3d at 226, 229; Olivares-Rangel, 458 F.3d at 1105, 1112-13; Guevara-Martinez, 262 F.3d at 752, 754-55. In fact, two of the cases relied upon by petitioner expressly distinguish between mere identity and identity-related evidence. See Oscar-Torres, 507 F.3d at 230 ("Despite the illegality of his detention or arrest, [a defendant] cannot suppress his person or the fact of his identity."); Olivares-Rangel, 458 F.3d at 1111 ("The language in Lopez-Mendoza merely says that the defendant cannot suppress the entire issue of his identity."). Likewise, the Eighth Circuit appears to have distinguished between a defendant's identity, which it would not suppress, and "identity evidence," *i.e.*, fingerprints, which are subject to suppression. See United States v. Perez-Perez, 337 F.3d 990, 993-94 (8th Cir. 2003); United States v. Navarro-Diaz, 420 F.3d 581, 585 (6th Cir. 2005) (discussing the Eighth Circuit's subsequent narrowing of its holding in Guevara-Martinez); see also 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(g) n.415 (4th Ed. 2004 & Supp. 2008-09).

Unlike these cases, the decision below does not involve section 1326, or fingerprint evidence. And contrary to what petitioner suggests, see Pet. 21, 25-26, the state high court did not hold that anything which could broadly be considered "identity-related evidence," such as fingerprints or witness identifications, are completely shielded from suppression. Rather, the court below "merely" held that pre-existing government records cannot be deemed the fruit of the poisonous tree when "the only link" between the assertedly improper police activity and those records "is that the police learned the defendant's name" as a result of that activity. Pet. App. A4. Thus, any limitation that the court below imposed on the scope of the exclusionary rule is quite narrow: the mere fact of a person's identity is not subject to suppression, whether directly or as a link in a causal chain that supposedly leads to some other evidence.

Indeed, even the circuits that have allowed suppression of fingerprint evidence in section 1326 cases would not likely apply the fruits doctrine on the facts presented here. Those courts distinguished fingerprints that were taken as part of a routine booking procedure, which were not suppressible, from fingerprints "obtained for an investigatory purpose exploiting the unconstitutional arrest," which could be suppressed. See Olivares-Rangel, 458 F.3d at 1121; Oscar-Torres, 507 F.3d at 231-32 (same; citing Olivares-Rangel); Guevara-Martinez, 262 F.3d at 753, 755-56 (same); see also Perez-Perez, 337 F.3d at 903-04. Put another way, the courts recognized the distinction between fingerprints obtained merely to identify a person and those

investigatory purpose

actually created to serve as evidence. Here, contrary to petitioner's contention, see Pet. 20-21, the record is devoid of any evidence that the stop of petitioner's vehicle was motivated by an investigatory purpose rather than an administrative one. Thus, even under the rule set forth in Olivares-Rangel, Oscar-Torres, and Guevara-Martinez, suppression would not be an available remedy.

II. The decision below is fully consistent with this Court's precedent.

While petitioner contends that the decision below is at odds with numerous Fourth Amendment precedents of this Court, see Pet. 15-26, the analysis and holding of the New York Court of Appeals is fully consistent with relevant Supreme Court precedent.

Petitioner claims that the decision below misinterprets this Court's ruling in Lopez-Mendoza, see Pet. 21-26, but Lopez-Mendoza appears to resolve the question presented here in favor of respondent. There, the Court held that "the 'body' or identity of a defendant . . . in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." 468 U.S. at 1039. Since the identity of the petitioner is all that was obtained by the police, that should end the inquiry. While petitioner claims that the Court in Lopez-Mendoza meant only to reiterate the well-established rule that a defendant can never use the exclusionary rule to contest personal jurisdiction, see Pet. 21-23, it likely would have stated simply that the "body" of a defendant is not subject to suppression had it so intended. More fundamentally, the

jurisdictional rule logically must mean that identity can never be suppressed. After all, if a defendant "can suppress the Government's evidence of who he is, then he has accomplished the same thing he would have accomplished had he suppressed the ability of the court to exercise jurisdiction over him." Farias-Gonzalez, 556 F.3d at 1188. In other words, if the government can never use the mere fact of a defendant's identity once they learn it as a result of an unlawful arrest, then it would never be able to locate him and bring him before the court.

Moreover, even if the reach of Lopez-Mendoza were unclear, this Court had concluded prior to Lopez-Mendoza that a defendant could not use his mere identity as a basis for a "poisonous fruit" claim. In Crews, a majority of the Court found that a defendant's "face," or appearance, was not a suppressible fruit of an illegal arrest. See Crews, 445 U.S. at 477 (Powell, J., joined by Blackmun, J., concurring), 477-79 (White, J., joined by Burger, C.J. and Rehnquist, J., concurring). Notably, Crews involved a claim that a subsequent in-court identification of a defendant had to be suppressed where the defendant's identity was obtained through an unlawful arrest. See id. at 465.[7]

---

[7] Since the principle that mere identity is not a suppressible fruit predates Lopez-Mendoza, it is not surprising that three federal circuit courts have held that the identity of a defendant is not suppressible, without relying on Lopez-Mendoza. See United States v. Arias, 678 F.2d 1202, 1206 (4th Cir. 1982) (citing Crews for the proposition that "the identity of defendants is not suppressible under the exclusionary rule"); United States v. Adegbite, 846 F.2d 834, 838-39 (2d Cir. 1988) (quoting Arias); Farias-Gonzalez, 556 F.3d at 1185-86 & n.5, 1189 (concluding that the disputed language in Lopez-Mendoza was dicta. (Continued...)

As the court below recognized, see Pet App. A3, Crews also suggests that the very nature of DMV records precludes any application of the exclusionary rule. Information that is in the possession of a public agency and has been compiled independently of and prior to an illegal stop is not suppressible as the "fruit" of that stop. See Crews, 445 U.S. at 475-77 & n.22 (plurality) ("The exclusionary rule ensures the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality."); see also Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960) (cited with approval in Crews, 445 U.S. at 476-77, and Davis, 394 U.S. at 725-26 n.4). Indeed, evidence already in existence—and in the possession of the government—before any purported illegality cannot be viewed as the fruit of that illegality. After all, Fourth Amendment interests in preventing the government from searching for or seizing evidence cannot be implicated when the government already possesses the evidence. See generally Hudson v. Michigan, 547 U.S. 586, 594 (2006) (since the knock and announce rule for the execution of search warrants does not protect one's interest in preventing the government from seeing or taking evidence described in the warrant, the exclusionary rule is inapplicable for a violation of the knock and announce rule).

(...Continued)
but still holding "that the exclusionary rule does not apply to evidence to establish the defendant's identity in a criminal prosecution").

Finally, this case is plainly distinguishable from Davis, 394 U.S. at 721, and Hayes, 470 U.S. at 811, as the court below also recognized. See Pet. App. A4-A5. In both Davis and Hayes, the evidence suppressed came into existence only after the unlawful stop or seizure, and as a direct product of the unlawful conduct. Indeed, in both cases, the police illegally detained defendants for the sole purpose of generating their fingerprints, so that they could compare those fingerprints to ones found at crime scenes. See Davis, 394 U.S. at 722-23; Hayes, 470 U.S. at 812-13. Here, by contrast, petitioner's DMV records were not only in existence before the purportedly illegal behavior, they were also in the government's possession before that behavior. And in both Davis and Hayes, the police were looking all along to generate proof that the defendants had committed specific crimes that the police were investigating; here, by contrast, the police simply wanted to know the identity of a driver they had stopped for playing music too loudly. See Pet. App. A4 (noting that the evidence in Davis and Hayes "established defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here").

III. This case presents a poor vehicle for resolving any questions about the scope of the exclusionary rule.

Because no court has yet decided if the police conduct at issue here was unlawful, this case presents an especially poor vehicle for resolving any questions about the scope of the exclusionary rule.

In response to petitioner's motion to suppress his DMV records, the People alleged that petitioner was properly stopped for playing loud music from his vehicle. See Pet. App. A39 (People's Affirmation in Response to the Defendant's Omnibus Motion); see also Pet. App. A2 (noting that "[t]he police stopped [petitioner] for playing music too loudly"). [5] The trial court, however, ruled only on the applicability of the exclusionary rule, without reaching the question of the legality of the traffic stop.

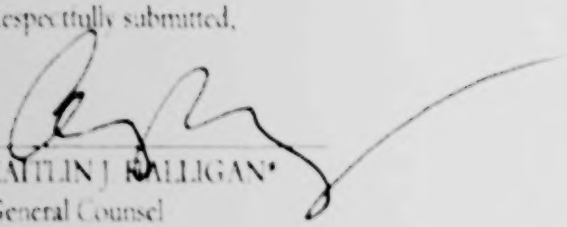
For this reason, even if this Court were to grant the petition for certiorari and hold that DMV records are subject to suppression in the circumstances presented here, a remand would be required to determine whether the records should, in fact, be suppressed. If the trial court concluded that the stop was lawful – and petitioner has not yet offered any reason to hold otherwise – then the records would be admissible. Thus, the question presented is not likely to be outcome determinative.

[5] Several provisions of the New York City Administrative Code in effect at the time petitioner was stopped prohibited the operation of any sound-making device in, inter alia, any vehicle operated on a public street in a manner that creates unreasonable noise. See N.Y.C. Code § 24-220(a); § 10-108(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BY 

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October 7, 2010

NOV 5 PAGE 5

Supreme Court, U.S.
FILED
OCT 22 2010
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NO. 09-11556

IN THE SUPREME COURT OF THE UNITED STATES

JOSE TOLENTINO,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

Respondent's Brief in Opposition repeatedly characterizes the Department of Motor Vehicles (DMV) records as "mere identity" evidence in an attempt to distinguish this case from those Federal Circuit cases dealing with the suppression of Alien Files (A-Files) (See Respondent's Brief at 8-12). Yet, both our case and the Federal cases we rely on all deal with evidence that is maintained in government files that investigating law enforcement personnel could not have accessed without information obtained during the illegal stop. This absurd distinction advanced by Respondent underscores the need for this Court to hear this case. It crystallizes the need for this Court to clarify its ruling in Immigration and Naturalization Service (INS) v. Lopez-Mendoza, 468 U.S. 1032 (1984), to address whether this Court intended to categorically eliminate certain evidence from the exclusionary rule solely because it is derived from "identity" or whether it was upholding the Ker-Frisbie doctrine that requires evidence – not the defendant himself -- to be the "fruit" of a suppression motion.

"Mere identity" is who you are, your name, body, identity. "Mere identity" is not subject to suppression for a very sound reason: because courts need to know who a criminal defendant is in order to confer jurisdiction over that individual. Despite Respondent's assertions to the contrary, Petitioner has always

acknowledged that a person's identity is not subject to suppression (See Petition at 22-24).

However, Petitioner does object to Respondent's assertion that DMV records are equivalent to "mere identity." (Respondent's Brief at 10-11, 13). Indeed, from a common sense perspective, Respondent's assertion is absurd. DMV records cannot be equated with "mere identity." They are a separate and distinct document of a person's driving record compiled by the government to help implement the rules of the road. DMV records, or any other type of pre-existing identity-related documentary records for that matter, are stored in such a way that they can be accessed by reference to certain identifying information (name, social security number, fingerprint, etc.). A person could still be made to appear in court -- in a jurisdictional sense -- whether or not the documents ultimately passed Constitutional muster and were allowed to be introduced as evidence in the case. There is no intelligent reason to exclude the category of identity-related evidence from the suppression rule, and this Court has never articulated such a rule.

If this Court allows this misperception of the law to persist, arbitrarily excluding identity-related evidence from suppression, this will lead to nonsensical results. Even now, Respondent and the courts below have fashioned a rule that would allow the exclusionary rule to apply where fingerprint evidence is used to access documentary evidence, but disallow the rule where the evidence is accessed

through reference to a name alone. This rule would mean that people who refuse to give their name to the police, or give a false name, or give a true name that is common (such as John Smith) so that the police must refer to additional identifying information to retrieve the proper file would be permitted to move for suppression of their DMV records, even though their counterparts, whose records were accessed through reference to their name, would be shut out from this avenue of recourse.

Additionally, this rule singling out identity-related evidence from suppression would lead to a hodge-podge deterrent effect. Would this Court condone a rule allowing suppression of only certain types of evidence obtained after an illegal seizure, regardless of the deterrent circumstances of the case? Does it make any sense that physical evidence such as guns and contraband are suppressible but documentary evidence is not? Does there exist any policy reason to exclude pre-existing identity-related evidence from the suppression rule with new, document-based crimes such as identity-theft being added every year? This Court can shed light on how the exclusionary rule applies where documentary evidence forms the basis of the investigation and prosecution of crime, in cases involving computers, cyber crime, identity-theft and other document-related crime.

This is not to say that all evidence obtained after unlawful police action must be suppressed. On the contrary, it is indisputable that evidence obtained by

"means sufficiently distinguishable" from the "primary illegality" will be found to be "purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963). The rationale has always been that evidence will be exempted from the exclusionary rule when there is only an "attenuated connection" between the Fourth Amendment violation and the derivative evidence, where a court concludes that the deterrent effect of suppressing the evidence is of minimal value. Nowhere in this analysis is there room for excluding "identity-related" evidence because it is accessed through files organized by name.

Indeed, since a fact-finding hearing was never conducted in this case, we do not know exactly what identifying features were elicited from Mr. Tolentino in order to access his DMV records. Indeed, it is possible that this case required more information than defendant's name, or "mere identity," in order to locate the correct DMV files, thereby qualifying him for a suppression hearing under Respondent's rationale (Respondent's Brief at 11).

This case began with Petitioner filing a motion to suppress. In that motion, Petitioner alleged that he was stopped arbitrarily by police on a fishing expedition trying to catch unlicensed drivers and other illegality. The exclusionary rule exists in order to protect people from just this type of unreasonable interference by the police, and suppression of the resultant evidence fulfills the societal need to deter unlawful police behavior. Petitioner's allegations set forth the quintessential

reason this Court established the exclusionary rule, to protect citizens from unreasonable interference by the police.

In stark contrast, Respondent alleged in the response to the motion to suppress that the police seized Petitioner because he was playing loud music from his vehicle (See Pet. App. A39). Despite the court below's statement to the contrary (See Pet. App. A2), these facts have not been proven. None of the allegations concerning the circumstances surrounding the stop of Petitioner's motor vehicle have been put to the test because the trial court denied the suppression motion on the ground that DMV records are not suppressible fruit. Since the hearing was never granted and the facts underlying this case were never fleshed out, Respondent's assertion that the DMV records were obtained for administrative purposes, not investigatory purposes, is inaccurate (See Respondent's Brief at 11-12). Had a hearing been held, this issue would likely have been examined and may indeed have provided grounds for denial of the suppression hearing. However, since the motion court denied the suppression motion outright, without conducting a hearing, on the ground that DMV records are not suppressible fruit, Respondent cannot assert that this case does not follow the line of federal cases allowing suppression of fingerprint evidence in section 1326 cases where the fingerprint evidence was collected for investigatory purposes, exploiting the unconstitutional arrest. See United States v. Olivares-

Rangel, 458 F.3d 1104, 1121 (10th Cir. 2006); United States v. Oscar-Torres, 507 F.3d 224, 231-32 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751, 755-56 (8th Cir. 2001).

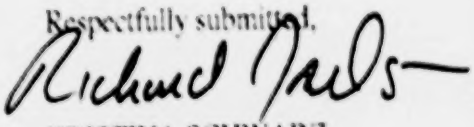
For this reason, Petitioner further objects to Respondent's characterization of this case as a poor vehicle for resolving questions about the scope of the exclusionary rule (See Respondent's Brief at 15-16). Indeed, because there was no factual hearing conducted, this case provides an excellent opportunity for this Court to shed clarity on this confusing area of the law of suppression, without the need to refer to a specific factual determination. This Court can answer whether Lopez-Mendoza should be interpreted to mean that jurisdictional identity cannot be suppressed or whether it is meant to exempt all identity-related evidence from suppression, even though obtained through violation of the Constitution. Because there was no fact-finding hearing, his case allows the Court to be free to craft a careful articulation of the status of the exclusionary rule, address how the rule applies to identity-related evidence, and resolve the split in the Circuit Courts concerning the applicability of the exclusionary rule to documentary evidence maintained by the government. The only question that needs to be resolved is whether governmental identity records are subject to the suppression rule. If so, a hearing should be granted; if not, then a clear message needs to be sent to guide courts to harmonize their decisions.

Petitioner's contention is that this Court should take this opportunity to reaffirm its holding in Lopez-Mendoza, explain the jurisdictional ramifications of the "body" or "identity" language in that case, and insert clarity into the question whether DMV records and other pre-existing government-compiled documents accessed by the police and utilized to justify an arrest should be considered suppressible "fruit" of unlawful police action violative of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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October 22, 2010

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No. 09-11556

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

JOINT APPENDIX

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APPENDIX A — CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

JOSE TOLENTINO *v.* STATE OF NEW YORK

New York County Criminal Court

1/2/2005 Complaint charging Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree and Unlicensed Driving filed.

New York County Supreme Court

4/19/2005 Indictment charging Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree filed.

5/11/2005 Petitioner arraigned on Indictment. Voluntary Disclosure Form filed.

5/26/2005 Omnibus Motion, including Motion to Suppress filed.

6/22/2005 Affirmation in Response to Omnibus Motion filed.

7/12/2005 Decision and Order of Hon. Rena K. Uviller on Omnibus Motion entered.

8/3/2005 Guilty Plea to Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree entered.

9/28/2005 Petitioner sentenced to five years of probation. Judgment entered.

9/28/2005 Notice of Appeal filed.

New York State Supreme Court, Appellate Division, First Department

6/30/2008 Appellant Brief filed.

1/6/2009 Respondent Brief filed.

2/3/2009 Submitted to Court for Decision.

2/24/2009 Decision affirming Order and Judgment of New York County Supreme Court issued.

New York Court of Appeals

5/14/2009 Order of Hon. Jonathan Lippman, Chief Judge, granting Leave to Appeal entered.

8/3/2009 Appellant Brief filed.

10/1/2009 Respondent Brief filed.

10/23/2009 Reply Brief filed.

2/10/2010 Oral Argument held.

3/30/2010 Decision affirming Order of the Appellate Division issued.

APPENDIX B — FELONY COMPLAINT, FILED JANUARY 2, 2005

CRIMINAL COURT OF THE
CITY OF NEW YORK
COUNTY OF NEW YORK

FELONY
ADA LI
212-335-9174

THE PEOPLE OF THE STATE OF NEW YORK

-against-

1. Jose Tolentino (M 43)

Defendant.

Police Officer Ronald Marto, shield 18399 of the 034 Precinct, states as follows:

On January 1, 2005, at about 20:01 hours at in the County and State of New York, the Defendant committed the offenses of:

1. VTL511(3)(a)(ii)	Aggravated Unlicensed Operation in the First Degree (1 count)
2. VTL509(1)	Unlicensed Driving (1 count)

the defendant operated a motor vehicle upon a public highway while having reason to know that his license or privilege of operating such vehicle in this state or his privilege of obtaining such a license was suspended or revoked and while having in effect ten or more suspensions imposed on at least ten separate dates for failure to answer, appear or pay an authorized fine; and the defendant operated a motor vehicle upon a public highway without being duly licensed.

The offenses were committed under the following circumstances:

Deponent states that he observed the defendant operating a motor vehicle (the key was in the ignition, the engine was running and defendant was behind the wheel) on a public highway, to wit Broadway and 181st Street. Deponent conducted a computer check of the records of the New York State Department of Motor Vehicles which revealed that defendant's driver's license was suspended on more than six times on more than twenty dates and has not been reinstated. Deponent's basis for believing that defendant had reason to know his/her license was suspended or revoked is as follows: the computer check revealed that defendant's license was suspended for failure to answer a New York summons and all such summons have printed on them, "If you do not answer this ticket by mail within fifteen (15) days your license will be suspended." The suspension occurs automatically (by computer) within 4 weeks of the defendant's failure to answer summons.

Appendix B

False statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law.

/s/	01/01/05 2330
Deponent	Date and Time

APPENDIX C — INDICTMENT, FILED APRIL 19, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of **AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE IN THE FIRST DEGREE**, in violation of Vehicle and Traffic Law §511(3)(a)(ii), committed as follows:

The defendant, in the County of New York, on or about January 1, 2005, operated a motor vehicle while having in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear and pay a fine, pursuant to subdivision three of section two hundred twenty-six and subdivision four-a of section five hundred ten of the Vehicle and Traffic Law.

ROBERT M. MORGENTHAU
District Attorney

APPENDIX D — VOLUNTARY DISCLOSURE FORM, FILED MAY 11, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

Docket No. 2005NY000685

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Jose Tolentino,

Defendant.

PEOPLE'S VOLUNTARY DISCLOSURE FORM

The People of the State of New York hereby voluntarily disclose to the defendant the following factual information pertaining to the above-captioned case:

A. *BILL OF PARTICULARS*

1. *OCCURRENCE*

Date: January 1, 2005
App. Time: 7:40 p.m.
Place: Broadway & 181st Street

Appendix D

2. *ARREST*

Date: January 1, 2005
App. Time: 10:00 p.m.
Place: 34th Precinct

B. ***NOTICES***

1. *STATEMENTS*

[X] If checked, notice is hereby served, pursuant to CPL §710.30(1)(a), that the People intend to offer at trial evidence of a statement made by defendant to a public servant. *(Where a statement has been video taped, counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time for viewing the tape or should provide a blank tape for copying.)*

Statement #: 1

Date: January 1, 2005
Approximate Time: 7:40 pm
Location: Broadway & 181st Street
Individual Made To: PO Trinidad & PO Marto
Substance of Statement: I don't have a NYS driver's license.

2. *IDENTIFICATION*

[ ] If checked, notice is hereby served, pursuant to CPL §710.30(1)(b), that the People intend to offer

at trial testimony regarding an observation of defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the indictment, to be given by a witness who has previously identified defendant.

C. *DISCOVERY*

1. *ADDITIONAL STATEMENTS*

[ ] If checked, the People hereby disclose written, oral or recorded statements of a defendant or of a co-defendant to be jointly tried, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him, and which statements are not given in section B(1) above. C.P.L. §240.20(1)(a).

2. *GRAND JURY TESTIMONY*

[ ] If checked, defendant or a co-defendant to be tried jointly testified before the Grand Jury relating to this criminal action. C.P.L. §240.20(1)(b). *Such testimony is available upon payment of a stenographic fee.*

3. *SCIENTIFIC AND MEDICAL REPORTS*

[ ] If checked, the People hereby disclose written reports or documents or portions thereof, concerning a physical or mental examination or

scientific test or experiment, relating to this criminal action, which were made by, or at the request or direction of a public servant engaged in law enforcement, or by a person whom the People intend to call as a witness of a trial, or which the People intend to introduce at trial. C.P.L. §240.20(1)(c).

4. *PHOTOGRAPHS AND DRAWINGS*

[ ] If checked, there exists photographs or drawings relating to this criminal action which were made or completed by a public servant engaged in law enforcement, or which were made by a person whom the People intend to call as a witness at trial, or which the People intend to introduce at trial. C.P.L. §240.20(1)(d). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this material.)*

5. *INSPECTION OF PROPERTY*

[ ] If checked, there exist photographs, photocopies or other reproductions made by or at the direction of a police officer, peace officer or prosecutor of property prior to its release pursuant to the provisions of Penal Law Section 450.10, irrespective of whether the People intend to introduce at trial the property or the photograph, photocopy or other reproduction. C.P.L. §240.20(1)(e). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this property.)*

Appendix D

6. *OTHER PROPERTY*

[ ] If checked, there exists other property obtained from the defendant, or a co-defendant to be tried jointly, C.P.L. §240.20(1)(f), or from another source. *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this property.)*

7. *TAPES AND ELECTRONIC RECORDINGS*

[ ] If checked, there exist tapes or other electronic recordings which the People intend to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction. C.P.L. §240.20(1)(g). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to listen to the tapes or provide a blank tape for copying.)*

8. *BRADY MATERIAL*

[ ] If checked, there is material appended which the People are required to turn over pursuant to the United States or the New York State Constitution. The People are aware of their continuing obligation to disclose material exculpatory information to defendant and intend to satisfy that obligation as required by law. C.P.L. §240.20(1)(h).

Appendix D

9. *COMPUTER OFFENSES*

[ ] If checked, discovery is hereby served pursuant to C.P.L. §240.20(1)(j) of the time, place and manner of notice given pursuant to Penal Law §156.00(6), which governs offenses for Unauthorized Use of a Computer (Penal Law §156.05) and Computer Trespass (penal Law §156.10).

10. *POLICE OFFICERS INVOLVED*

The following are some of the officers who were involved in the arrest or police investigation.

Name	*Shield*	*Command*
Ronald Marto	18399	34 Precinct
Antonio Trinidad	15630	34 Precinct
Thomas Carroll		34 Precinct

11. *SEARCH WARRANTS*

[ ] If checked, a search warrant was executed during the investigation of this case.

D. ***DEMAND FOR NOTICE OF ALIBI***

Pursuant to CPL §250.20, the People hereby demand that defendant supply the District Attorney with (a) the place or places where the

defendant claims to have been at the time of the commission of the crime(s) and (b) the names, residential addresses, places of employment and addresses thereof of every alibi witness upon whom defendant intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Within a reasonable time after the receipt of the information specified above, the District Attorney will submit a list of any rebuttal witnesses, their addresses, and employers.

E. ***RECIPROCAL DISCOVERY***

Pursuant to CPL §240.30(1), the People hereby demand that defendant supply the District Attorney with (a) any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test, experiment, or comparisons, made by or at the request or direction of the defendant, if the defendant intends to introduce such report or document at trial, or if defendant has filed a notice of intent to proffer psychiatric evidence and such report or document which relates thereto or if such report or document was made by a person other than defendant, whom defendant intends to call as a witness at trial; and (b) any photograph, drawing, tape, or other electronic recording which the defendant intends to introduce at trial.

NOTE: Any defense motion or request addressed to the above-captioned case should be directed to the attention

of the Assistant District Attorney named below, who is assigned to this case.

Dated: New York, New York
April 11, 2005

Robert M. Morgenthau
District Attorney
One Hogan Place
New York, NY 10013

By: Joanne Li
Assistant District Attorney
335-9174

APPENDIX E — NOTICE OF OMNIBUS MOTION INCLUDING MOTION TO SUPPRESS, FILED IN NEW YORK COUNTY SUPREME COURT ON MAY 26, 2005

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. NO.: 1982-2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

NOTICE OF OMNIBUS MOTION

PERSONS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of GERARD M. DEENIHAN, ESQ., an attorney duly admitted to practice law in the State of New York, the annexed exhibits and the prior proceedings herein, the undersigned will move this Court at Part 72, on the 22nd day of June 2005, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an order:

Appendix E

1. Dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §§210.20, on the grounds that the evidence before the grand jury was not legally sufficient;

2. Dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §§210.20, on the grounds that the grand jury proceeding was defective within the meaning of C.P.L. §210.35. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, Sec. VI;

3. Granting a full inspection of the grand jury minutes by the court and defense counsel. To the extent that this Court is not willing to fully dismiss the indictment based on its own inspection, the defense requests full disclosure of the grand jury minutes to the parties, or in the alternative, relevant portions thereof, including but not limited to the prosecutor's legal instructions. In the alternative, defendant requests an order retaining a sealed copy of the grand jury minutes as a court exhibit, for inclusion in the record on appeal. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, Sec. VI; C.P.L. §210.30;

4. Suppressing the defendant's Department of Motor Vehicles records, and any testimony regarding such records, and any other tangible or testimonial fruits of the illegal seizure and

search of the defendant, including post-seizure observations of the defendant operating the vehicle, or, in the alternative, directing the holding of a *Mapp/Dunaway* hearing, pursuant to CPL. §§ 710.20(1) and 710.60.

5. Suppressing any and all statements allegedly made by defendant or, in the alternative, directing the holding of a *Huntley/Dunaway* hearing. C.P.L. § 710.20(3).

6. Suppressing any tangible or testimonial fruits of the illegal seizure and search of the defendant, or, in the alternative, directing the holding of a *Dunaway* hearing, pursuant to C.P.L. §§ 710.20(1) and 710.60;

7. Precluding the prosecution from introducing evidence of any statement or identification testimony at trial for which proper notice has not been given pursuant to C.P.L. § 710.30(3);

8. Compelling Discovery pursuant to C.P.L. 240.40;

9. Compelling a Bill of Particulars pursuant to C.P.L. 200.95(5) and C.P.L. 100.45;

10. Precluding at trial the use of the defendant's prior criminal history or prior uncharged criminal, vicious, or immoral conduct;

Appendix E

11. Reserving to defendant the right to make additional motions as necessary; and for such other relief as this Court may deem just and proper.

DATED: NEW YORK, NEW YORK
May 25, 2005

Respectfully Submitted,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, New York 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

Appendix E

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. No. 1982 -2005

THE PEOPLE OF THE STATE Of NEW YORK

-against-

JOSE TOLENTINO,

DEFENDANT

AFFIRMATION IN SUPPORT OF MOTION

PERSONS:

GERARD M. DEENIHAN, ESQ., an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury that:

1. I am associated with STEVEN BANKS, ESQ., and am attorney of record for the defendant, JOSE TOLENTINO. I am familiar with the facts of this case and make this affirmation in support of defendant's motion herein.

2. Unless otherwise specified, all allegations made in this affirmation are made upon information and belief based upon affiant's investigation, discussions with the

Assistant District Attorney, and the papers and proceedings had prior to this motion.

3. JOSE TOLENTINO is charged with V.T.L. § 511(3)(a)(ii), Aggravated Unlicensed of a Motor Vehicle in the First Degree.

4. The defendant was arrested on January 1, 2005 and arraigned in New York City Criminal Court, New York County, Part AR3, on January 2, 2005.

5. The defendant was arraigned in New York State Supreme Court, New York County, Part 72, on May 11, 2005.

6. I have conferred with the defendant in an effort to obtain the information necessary to prepare a defense in this case. Other than the general allegations in the complaint, defense counsel and the defendant have no independent means of obtaining precise information as to the charges in this complaint.

7. All of the information requested by the defendant is necessary for the proper preparation of the trial in this case and the avoidance of any delay once trial begins. Without such information, I cannot adequately represent the defendant.

8. Such information is within the knowledge and control of the New York County District Attorney's office and/or its witnesses. The information cannot be obtained from any other source.

Appendix E

MOTION TO INSPECT THE GRAND JURY MINUTES

9. The defendant respectfully moves this Court for an inspection of the grand jury minutes pursuant to C.P.L. §210.30. To the extent that this Court is unwilling to grant in full defendant's pending applications to dismiss all counts of the indictment based upon the Court's own inspection of the minutes, the defense requests that the Court release the minutes, in their entirety, to defense counsel, so that counsel may effectively analyze whether colorable dismissal issues exist and, to the extent that they do, effectively present written and oral argument in support thereof. In the alternative defense counsel requests a partial inspection of relevant portions, including all applicable legal instructions, absent a particularized showing by the prosecution of a reason to deny inspection. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. 1, Sec. VI.

10. To the extent that concerns for the privacy or safety of witnesses are presented, the defense is willing to accede to an inspection of the minutes by counsel alone, subject to any appropriate orders restricting disclosure of the minutes to the defendant personally.

11. In the alternative, and to the extent that this Court does not order full disclosure of the grand jury minutes, defendant requests an order directing that a sealed copy of the minutes, or undisclosed portions thereof, be retained as a court exhibit for inclusion in the record on appeal from any prospective judgment of

conviction. The defense is entitled as a matter of law to such an order, since it is necessary to fully effectuate defendant's right to appeal, as guaranteed by State statutory law, the Due Process Clause of the N.Y. Constitution, Article, I, Section VI, and the Equal Protection Clauses of the State and federal Constitutions.

MOTION TO DISMISS OR REDUCE COUNTS OF THE INDICTMENT BECAUSE THEY ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

12. The defendant moves this Court, upon the court's inspection of the grand jury minutes, as is requested, *ante*, for an order dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §210-20(1)(b), on the grounds that the evidence before the grand jury was not legally sufficient to establish the offenses charged or any lesser included offense.

13. Pursuant to C.P.L. 210.20(1), the defendant moves to dismiss the indictment, if upon inspection the court determines that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the charges or of any lesser included offense. In particular:

a. As to the charge of V.T.L. § 511(3)(a)(ii), Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, the evidence was not legally sufficient to establish that:

1) Defendant was operating a motor vehicle;

2) Defendant operated a motor vehicle on a public highway;

3) At the time defendant operated a motor vehicle on a public highway, he had in effect ten or more suspensions on his driver's license;

4) Such suspensions were imposed for failure answer, appear or to pay a fine;

5) Such suspensions were imposed pursuant to V.T.L. § 226(3) or V.T.L. § 510(4 - a);

6) Such suspensions were imposed on at least ten different dates.

MOTION TO DISMISS OR REDUCE COUNTS OF THE INDICTMENT BECAUSE THE GRAND JURY PROCEEDING WAS PROCEDURALLY DEFECTIVE

14. The defendant moves this Court, upon the court's inspection of the grand jury minutes, as is requested, *ante*, for an order dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §210.20(1)(c), on the ground that the grand jury proceeding was defective within the meaning of C.P.L. §210.35 (C.P.L. §210.20(1)(c)) because:

a. the grand jury was illegally constituted (C.P.L. §210.35 (1));

b. the proceeding was conducted before fewer than sixteen grand jurors (C.P.L. §210.35(1));

c. fewer than twelve grand jurors concurred in the finding of the indictment; (C.P.L. §210.35(3)); and

d. the proceeding otherwise failed to conform to the requirements of Criminal Procedure Law, Section 190, other applicable State law, and the State and federal constitutions to such degree that the integrity thereof was impaired, and prejudice to defendant might have resulted (C.P.L. §210.35(5)); defaults in the conformity of the proceedings include but are not limited to:

   i. the violation by the prosecutor of the applicable constitutional, statutory, and common-law rules of evidence, including the applicable rules against hearsay (*see* (C.P.L. §190. 30);

   ii. the presentation of deficient or erroneous instructions on the law and the weight of the evidence to the grand jury, including but not limited to the incorporating by reference of instructions given to this grand jury regarding the same crime in the course of an earlier presentation. *People v. Brown*, 81 N.Y.2d 798 (1993); C.P.L. §190.25(6).

iii. the failure of the prosecutor to present exculpatory evidence that the People knew or should have known existed;

iv. the presentation of improper and extraneous material to the grand jury;

v. the utilization by the prosecutor of the grand jury as a discovery device to prepare for trial; and

vi. the improper cross-examination of the defendant and/or other defense witnesses by the prosecutor.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

15. Defendant has not been provided with police reports or other *Rosario* material that may be necessary to support suppression of physical evidence; the defendant should therefore not be denied a suppression hearing on the grounds that the defendant is unable to give precise factual arguments in support of this motion. *People v. Mendoza*, 82 N.Y.2d 415 (1993); *see also People v. Landy*, 59 N.Y.2d 369, 374; *People v. Gruden*, 42 N.Y. 2d at 218.

16. Nonetheless, given the limited information thus provided to defense counsel (the complaint and the Department of Motor Vehicles abstract), there are no factual allegations indicating that why defendant was stopped. Defendant was operating the motor vehicle in

accordance with all posted traffic laws. Defendant was simply driving the car on a public road and denies committing any traffic infraction that would have given the police cause to stop his vehicle.

17. Defendant's vehicle was stopped without reasonable suspicion, probable cause, or any other legal justification, therefore, violating his Constitutional rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6 and 12 of the New York State Constitution. Any evidence thus seized from the defendant as a result of this illegal seizure is therefore subject to suppression as **fruits of his illegal seizure and search.** *Mapp*, 367 U.S. at 655 ("**All evidence** obtained by searches and seizures in violation of the constitution is, by the same authority, inadmissible in a state court."); *Dunaway v. New York*, 422 U.S. 200 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. DeBour*, 40 N.Y.2d 210 (1976); *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. DeBour*, 40 N.Y.2d 210 (1976); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *People v. Bigelow*, 66 N.Y.2d 417 (1985); *See People v. Rossi*, 80 N.Y.2d 952 (1992).

18. Defendant, therefore, moves to suppress the evidence obtained in this case, to wit, his Department of Motor Vehicle ("DMV") records, and any testimony regarding such records as well as any tangible or testimonial **fruits of his illegal seizure and search** by police, including observations of the defendant by police,

on the ground that he was seized and searched in violation of his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6 and 12 of the New York State Constitution.

DEFENDANT DOES HAVE STANDING TO MOVE FOR SUPPRESSION OF ALL EVIDENCE OBTAINED

19. **All occupants of a car stopped by the police have standing to contest the illegality of the stop.** *People v. Millan*, 69 N.Y.2d 514 (1987), *People v. May*, 81 N.Y.2d 716 (1992). Here, the car and the defendant were seized when the police stopped the car. Thus, defendant has standing to seek suppression of his DMV records as the fruit of his unlawful seizure. *See People v. George Azpuru*, Decision and Order, Docket No. 2003NY002384 (Crim. Ct. N.Y. Co. 8/26/02) (Harris, J.); *People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizuan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.); *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.); *People v. Rossi*, 80 N.Y.2d 952 (1992).

DMV RECORDS ARE SUPPRESSIBLE AS FRUITS OF FOURTH AMENDMENT VIOLATIONS

20. As a direct result of the defendant's unlawful seizure by the police, described above, the police and

the prosecution obtained his DMV records. As stated in the complaint, the police officer conducted a computer check of the defendant's DMV records "which revealed that defendant's license was suspended and has not been reinstated." Subsequently, a Department of Motor Vehicles Abstract of Driving Record of the defendant was obtained by the prosecution from the Department of Motor Vehicles and filed with the Court and served on the defense. **But for defendant's unlawful seizure by the police, his DMV records would not have been obtained in this case, and they are therefore the fruit of the police illegality. The steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number. Without this basic information, which identifies the driver, a DMV check cannot be run by the police officer.** Thus, the information obtained from the DMV check is inextricable from the stop of the vehicle. As the court in *Azpuru* recently explained,

> [B]ut for the stop, the **critical link** between the defendant's identity, his operation of the vehicle and his unlicensed status might not have been learned by the arresting officer. Thus, if the stop was unlawful, and the police had no untainted basis for determining defendant's unlicensed status, evidence of that status should be suppressed.

21. The *Azpuru* decision builds on a line of cases standing for the proposition that DMV records are

suppressible pursuant to the exclusionary rule and the "fruit of the poisonous tree" doctrine. *See, e.g., People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.); *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.).

22. This is a subset of the more general and well-established proposition, adhered to by the Court of Appeals, that the exclusionary rule is not limited to tangible evidence, evidence of defendant's statements, or testimony of prior identifications of the defendant; rather, it is broadly applicable to intangible fruits of illegal police conduct. *See People v. Gethers*, 86 N.Y.2d 159 (1995) (holding that undercover officer's confirmatory identification of a defendant is subject to suppression if it is the product of an illegal arrest), *People v. Rossi*, 80 N.Y.2d (1992) (reversing the denial of defendant's suppression motion requesting a *Dunaway* hearing, and holding that testimony by a police officer about his **observations** of defendant's post-arrest conduct was suppressible as fruit of the wrongful arrest); *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (finding no "**logical distinction between physical and verbal evidence [,]**" and holding that "**testimony as to matters observed** during an unlawful invasion" is suppressible under the exclusionary rule); *see also Davis v. Mississippi*, 394 U.S. 721 (1969) (holding that evidence of defendant's fingerprints was suppressible under the exclusionary rule); *People v. May*, 81 N.Y.2d 725 (1992) (holding that the illegal

seizure of defendant in a stolen vehicle warranted suppression of police photographs of the vehicle); *People v. Dory*, 59 N.Y.2d 121, 126-27 (1983) (noting that "testimony . . . concerning physical evidence observed or seized . . . or incriminating actions observed and not attenuated" would be inadmissible as fruits of illegal police conduct); *People v. Ortega*, 241 A.D.2d 369 (1st Dept. 1997) (holding that because defendant's arrest was illegal, the suppression order extended to an officer's observations of the defendant following the arrest, including testimony as to what the defendant was wearing); *People v. Young*, 202 A.D.2d 1024 (1994) (holding that where an arrest was not supported by probable cause, police observations made at the point of and following the arrest must be suppressed); *People v. Akwa*, 151 Misc.2d 106 (Sup. Ct., King's Co. 1991) (holding that **police testimony as to "the identities of the defendants based upon observations and inquiries that flowed directly from the stop** of th[e] car [later discovered to have been stolen] and the seizure of its occupants" was suppressible as the fruit of the unlawful seizure); *People v. Ali*, Docket No. 98N066096, Decision and Order, May 5, 1999 (Mondo, J.) (granting a "*Dunaway*" hearing because "defendant is entitled to suppression of any observations the police were able to make based on an unlawful search or seizure").

23. Thus, the exclusionary rule is clearly "not limited to the suppression of physical tangible evidence." *Santiago*, 168 Misc.2d at 886. The discovery of the defendant's DMV records was made by the exploitation

of his illegal seizure, and as such constitutes suppressible fruit of the poisonous tree. Although a defendant's body or identity cannot be suppressed as the fruit of an unlawful stop or arrest (*see INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Crews*, 445 U.S. 463 (1980)), **DMV records are *not* "merely an extension of the defendant's identity."** *Santiago*, 168 Misc.2d at 886. Just as testimony as to the identification of the defendant is suppressible if the identification was the result of the illegal seizure of the defendant (*see People v. Gethers*, 86 N.Y.2d 159 (1995)), so testimony as to the defendant's DMV records -- and the records themselves -- are suppressible, if "**but for [the stop of the defendant] . . . the defendant's DMV records would not have come to light.**" *Thomas*, 164 Misc.2d at 725; *see also Santiago*, 168 Misc.2d at 886; *Rizwan*, 165 Misc.2d at 987.

24. **The Department of Motor Vehicles records, while public records, remain the product of an illegal seizure**. Although the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest, law enforcement obtained these records as a direct result of the defendant's **illegal street stop** and subsequent arrest. If the defendant had not been stopped, detained and arrested unlawfully, the District Attorney would not have obtained the records which the prosecution will seek to introduce at trial.

25. **As this court is aware, a DMV check cannot be run simply from observing the license plate of a**

car driving down the road. The steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number. Without this basic information, which identifies the driver, a DMV check cannot be run by the police officer. Thus, the information obtained from the DMV check is inextricable from the stop of the vehicle. In this case, had it not been for the illegal stop, the police officer would not have been able to run a DMV check. Thus, there is a **direct connection** between the stop, the driver, the taking of the license, and the DMV abstract. Testimony elicited to obtain the identification of the defendant is also suppressible as fruit of the poisonous tree, if the identification was the result of the illegal stop and seizure of the defendant. *See People v. Gethers*, 86 N.Y.2d 159 (1995).

26. In the instant case, it is not the privacy interest of the DMV records that is at issue, it is the defendant's standing **to contest the stop of the car** and the suppression **any fruits of the illegal seizure**. Furthermore, inasmuch as defendant had not committed a traffic infraction, he had a reasonable expectation of privacy in his DMV records under the Federal Driver's Privacy Protection Act, 18 U.S.C. Sec 2721. *See People v. Moya*, 192 Misc.2d 670, 672, 748 N.Y.S.2d 648. **The federal act allows disclosure of motor vehicle records only to lawful functions** of a governmental agency. *Id.* at 677. Thus where the police illegally seize the defendant and obtain information from that seizure, the

defendant has a privacy right in his motor vehicle records.

27. Although the Appellate Term Second Department held in *People v. Sajous*, that a motorist lacked standing to move to suppress a DMV abstract, "because there was no reasonable expectation of privacy in DMV files," the court's decision did not fully address the issue in front of this court. 180 Misc.2d 693, 695 N.Y.S.2d 471. The Court in *Sajous* held that the defendant was "required to establish that he had a legitimate expectation of privacy **in the search of the DMV files** and that his expectation of privacy was reasonable under the circumstances." *Id.* **However**, the *Sajous* case does not discuss suppression of observations obtained due to an illegal stop, the issue currently before this court.

28. Additionally, this Court is not bound by the findings of the Second Department's decision in *People v. Sajous*. It does not address the issue in question, which is the legality of the stop and thus the fruits of that seizure of the defendant. 180 Misc.2d 693, 695 N.Y.S.2d 471. Furthermore, there is a split in New York law on this issue and case law from concurrent jurisdictions, which are **on point**, have held that a suppression hearing should be granted to determine whether the stop by the police was legal. *See Moya*, 748 N.Y.S.2d at 650; *Azpuru*, 2003NY002384 (Crim. Ct. N.Y. Co. 8/26/02; *People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.);

People v. Thomas, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.); *People v. Rossi*, 80 N.Y.2d 952 (1992); *People v. Velit*, No. 2001QN027671, (N.Y. Crim. Ct. Queens County 2002). Whether any evidence obtained from the stop is fruit from the poisoness tree is an issue which should be resolved by the findings of the hearing court.

DEFENDANT WAS SEIZED ILLEGALLY

29. To seize a car, even temporarily, the police need a reasonable suspicion that its occupants have been, are, or are about to commit a crime or a traffic violation. *Delaware v. Prouse*, 440 U.S. 648 (1979), *People v. Ingle*, 36 N.Y.2d 413 (1975). Here, the car and the defendant were seized when the police stopped the car. **On the day of the defendant's warrantless seizure and arrest by the police and on the day of the alleged incident, he had not been engaged in any unlawful or suspicious conduct. He had not been driving in an erratic, dangerous or otherwise unlawful manner, nor was there anything illegal about the condition of his automobile. Additionally, defendant was not playing his radio at an unlawfully high volume.** Moreover, any contrary information was not communicated to the police by a reliable source with personal knowledge. The defendant specifically challenges the reliability and basis of knowledge of any informant who may have transmitted information to the police. Therefore, his warrantless seizure by the police was unjustified and, consequently, unconstitutional, in that it was not based on reasonable suspicion or probable cause.

30. In the instant case, there is clearly a direct, causal relationship between the illegal stop of the defendant's vehicle and the discovery of the defendant's record of suspensions. The **People have alleged that the defendant was stopped while driving a car, effecting a seizure for the purposes of the Fourth Amendment**. The police officer then ordered the defendant to turn over her license to the officer. From that information, the officer came to the conclusion that the defendant had outstanding suspensions of his license. The **illegal stop of the defendant led directly to the discovery of the defendant's driving records**.

31. More importantly, once a police officer has stopped a car and thus seized an individual, the burden lies with the prosecution, to show that the stop of the occupant's car was based on reasonable suspicion that a crime has been, is, or is about to be committed and it was the defendant who had committed the crime. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Prior to the seizure of defendant, there are no allegations of any illegal activity. It is only after the DMV check was run, that there is any allegation of illegal conduct by defendant. Thus, without the illegal conduct by the police, there would have been no discovery of the DMV abstract.

MOTION TO SUPPRESS STATEMENTS

32. During defendant's arraignment in Criminal Court, the prosecution served notice that it intended to introduce a statement against the defendant at trial.

33. The defendant moves to suppress this statement pursuant to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Article 1 § 6 of the Constitution of the State of New York, and C.P.L. §§60.45 and 710.20 and contends that it was illegally obtained on the following grounds:

A. It was the tainted fruit of an illegal arrest in that the defendant was arrested without probable causes. See above, at paragraphs 29-31.

B. It was made after the defendant was subjected to custodial interrogation without first being advised of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 435 (1966).

C. The defendant made this statement without knowingly and voluntarily waiving those rights.

D. The statement was involuntary. C.P.L. §60.45.

E. The statement was secured in violation of the defendant's right to counsel.

34. Therefore, all statements made by the defendant must be suppressed, or a hearing granted to litigate the issues. *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

35. Furthermore, defendant moves to suppress any unnoticed statements for impeachment purposes, or in

the alternative, defendant requests a pre-trial hearing to determine the voluntariness of any such statement pursuant to C.P.L. §§ 60.45 and 710.40. *See also People v. Clemons*, 166 A.D.2d 363 (1st Dept. 1990); *People v. Grillo*, 176 A.D.2d 583.

Any Statements Elicited From The Defendant Were Involuntarily Made And In Violation Of Miranda

36. The defendant asserts that any statements made by him were involuntary, in that they were elicited by coercion and the force of police authority. In addition, any such statements were obtained by means of police interrogation while the defendant was in police custody, prior to a proper advisement of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 435 (1966). The defendant is not required to make any other specific factual allegations as to the involuntariness of these statements. *See* C.P.L. §§ 710.20(3) and 710.60(3)(b).

MOTION TO PRECLUDE THE OFFERING OF EVIDENCE

37. The prosecution is required to give the defendant notice of intent to offer evidence of statements or identification testimony within 15 days of arraignment, pursuant to CPL. § 710.30.

38. The defendant has not received notice of the prosecution's intention to offer either statement or identification testimony during the prescribed period.

No good cause exists for this failure to provide the required notice.

39. The defendant therefore requests that any testimony concerning statements or identification for which proper notice has not been given be precluded, pursuant to CPL. § 710.30(3). *See also People v. O'Doherty*, 70 N.Y.2d 479 (1987); *People v. Baughton*, 70 N.Y.2d 854 (1987).

MOTION FOR A VOLUNTARINESS HEARING

40. The defendant seeks preclusion of any other unnoticed statements, if they exist, so the Court may determine their voluntariness. C.P.L. § 60.45. The prosecution may not intend to use any such statements in their direct case; however, the defendant needs notice of any statements which my be used to impeach his on cross examination in the event that the defendant intends to testify on his own behalf. Notice of these statements is imperative as it will assist the defendant in choosing whether or not to testify in this litigation. *People v. Utley*, 353 N.Y.S.2d 301, 313 (N.Y.Co. 1974) ("[t]he public policy of this state abhors the use of incriminating statements without first giving sufficient notice to the defendant and granting him an opportunity to investigate and plan his defense accordingly").

41. The defendant further asserts that these statements, if they exist, were involuntary, as they were directed by coercion and the force of the police authority.

The defendant is not required to make any other specific factual allegations as to the involuntariness of his statements. CPL 710.20(3); 710.60(3) (b).

42. For the reasons above, the defendant requests that all statements sought to be introduced as evidence be precluded and, in the alternative, that a hearing be ordered for the purpose of determining the propriety of the defendant's request that his statements be precluded.

SANDOVAL MOTION

43. The defendant moves to preclude the prosecutor from using at trial evidence of any and all of defendant's prior criminal convictions, any and all underlying bad acts, and any and all prior uncharged criminal, vicious, or immoral conduct. With respect to uncharged conduct, the defendant alternatively demands that the prosecution supply her with all specific instances of prior uncharged conduct that they will seek to offer on their direct case against the defendant, so that a timely hearing may be held as to the admissibility of such uncharged conduct. *See People v. Ventimiglia*, 52 N.Y.2d 350, 362 (1981).

44. The defendant intends to testify in this matter. Therefore, the defendant moves to preclude the District Attorney from cross-examining the defendant at trial on any of the defendant's prior arrests or any uncharged criminal, vicious, or immoral conduct that the

prosecution may be aware of. *See People v. Sandoval*, 34 N.Y.2d 371 (1974); CPL. § 240.43.

45. The defendant's prior arrests and bad acts should be suppressed because their use on cross-examination would have no purpose other than to show that defendant has a propensity to commit crimes and, therefore, is likely to have committed the crimes charged in the accusatory instrument. *See People v. Schwartzman*, 24 N.Y.2d 241 (1969); *People v. Shields*, 58 A.D.2d 94 (1977), *aff'd*, 46 N.Y.2d 764 (1978).

NOTICE OF DEMAND FOR PRESERVATION AND PRODUCTION OF ALL RADIO OR OTHER RECORDED POLICE COMMUNICATION

46. The defendant wishes to put the prosecution on notice that he is requesting the production of all recorded police communications related to this case, included, but not limited to the 911 tape, any radio runs or Sprint records and any communications between the police officers. The defendant is therefore putting the prosecution on notice that they must obtain this material from the police department and prevent its destruction before it is produced.

47. The defendant wishes to put the prosecution on notice that he is hereby challenging the reliability of any transmitted information the officers in this case may have relied upon.

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NOTICE OF DEMAND FOR PRESERVATION OF ALL EVIDENCE

48. The defendant wishes to put the prosecution on notice that he is requesting the preservation of all evidence related to this matter. The defendant is therefore putting the prosecution on notice that they must obtain this material from the police department and prevent its destruction before it is produced.

MOTION TO COMPEL A BILL OF PARTICULARS

49. Attached to and made a part of this Motion is Exhibit A, the defendant's Request for a Bill of Particulars made pursuant to CPL. §§ 200.95(5) and 100.45.

50. Should the prosecution fail, without justification or good cause, to comply, in whole or in part, to the Request for a Bill of Particulars, defendant moves in advance for an order compelling disclosure of the information requested. *See* C.P.L. §§200.95 and 100.45.

51. I have conferred with the defendant in an effort to obtain information necessary for the preparation of the defense in this case. The accusatory instrument contains none of the particulars requested and does not contain the specificity required for the defendant to be informed of the exact nature of the charges against him. Defense counsel and defendant have no independent means of obtaining precise information as to the charges

in this case, other than the general allegations of the complaint. All of the information requested by the defendant is necessary for the proper preparation of the trial defense in this case and for the avoidance of delay once trial begins. Without such information, defense counsel cannot adequately represent the defendant. Such information is within the knowledge and control of the District Attorney of New York County, and/or its witnesses. The information cannot be obtained from any other source.

52. None of the requested particulars are evidentiary in nature, nor will they reveal how the prosecution intends to prove the alleged facts.

53. Defendant is requesting only that the District Attorney reveal what facts the prosecution intends to sustain at trial on the accusatory instrument. The accusatory instrument does not adequately inform defense counsel of the factual basis underlying the conclusory allegations of the crimes charged. The Court of Appeals has ruled that a defendant is entitled to be informed of the specific facts underlying each element of the crimes charged. *People v. Iannone*, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978).

54. Consequently, the defense requests that this court order the prosecution to reveal the factual information requested in the attached Bill of Particulars.

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MOTION TO COMPEL DISCOVERY

55. Attached hereto and made a part hereof, as Exhibit B, is the defendant's Demand to Produce made pursuant to CPL. §240.20.

56. Should the prosecution, within 15 days of the filing of the Demand to produce, fail to respond in writing or, without justification or good cause, does not comply or only complies in part with defendant's demand to produce, defendant moves in advance for an order compelling disclosure of the information requested. *See* C.P.L. §§ 240.35, 240.40(1) (a), and 240.70.

57. All of the information requested in the Demand to Produce is material and essential to the adequate preparation of a defense and to avoid unnecessary delay at trial. The information is within the knowledge and control of the District Attorney's office and/or its witnesses, the production of these materials would not place an unreasonable burden on the District Attorney's office. Most importantly, the defense cannot obtain the requested information or property through any other means.

58. The prosecution may argue that the Voluntary Disclosure Form (VDF) provides all the pre-trial discovery to which the defendant is entitled. That interpretation too narrowly construes the discovery statute and provides the prosecution with an unsound and unfair tactical advantage. The Court of Appeals has

held that broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes tactical and often unfair advantages to one side, and increases to some degree, the opportunity for the accurate determination of guilt or innocence. *People v. Copicotto*, 50 N.Y.2d 222 (1980). Furthermore, justice is best served, and the rights of the defendant best protected within the framework of statutory and decisional law. *People v. DiMatteo*, 80 Misc.2d 1029 (Sup. Ct. Richmond Co. 1975). Disclosure should not be denied solely to give the prosecution a tactical advantage or to lay the basis for trial by ambush. *Id.* at 1031 (citing *People v. Utley*, 77 Misc.2d 86, *People v. Blair*, 64 Misc.2d 519, 521). The truth is best served by a decent opportunity to prepare in advance of trial. Therefore, the defense asks that the court grant the defendant's discovery requests beyond the scope of the prosecution's VDF.

PRECLUSION AS RELIEF FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS AND THE REQUEST FOR A BILL OF PARTICULARS

59. Should the prosecution fail to timely serve written refusal to comply with the Demand to Produce and Request for a Bill of Particulars setting forth the grounds for its refusal, or if this Court is satisfied that the prosecution has not shown good cause or justification for such refusal, the court must order the prosecution's compliance with defendant's request. *See* C.P.L. §§200.95(5) and 240.40(1).

60. In the event the prosecution fails to comply with a court ordered Demand to Produce and/or the Request for a Bill of Particulars, the defense moves in advance for an order precluding the District Attorney from calling any witness or introducing any evidence related to the information sought in the Demand to Produce and/or Request for a Bill of Particulars. *See* C.P.L. §§200.95(5) and 240.70(1).

61. In the alternative, the court should order the prosecution to make available for inspection, photographing, copying and/or testing, within ten days of the oral order of the court, any and all items and/or property encompassed by the defendant's Demand to Produce and/or Request for a Bill of Particulars.

RESERVATION OF RIGHTS

62. The defendant respectfully requests the right to make any and all further motions as may be necessary based upon information and disclosures that may result from the granting of requests made in this motion. *See People v. Frigenti*, 91 Misc.2d 139 (N.Y. Sup. 1977); CPL. § 255.20(3). The defendant also reserves the right to request an adjournment after pre-trial hearings and to investigate information developed at such hearings pursuant to *People v. Peacock*, 31 N.Y.2d 907 (1972).

63. The defendant reserves the right to be prosecuted only pursuant to a legally sufficient misdemeanor information. The defendant does not waive

that right by filing this motion. *See People v. Weinberg*, 34 N.Y.2d 429 (1974).

64. The defendant does not consent to any delay of his right to a speedy trial in this matter except where such consent is expressly given by him.

WHEREFORE, the affiant respectfully requests this Court to grant the relief sought herein and reserve to defendant the right to amend or supplement this motion for such other and further relief as this Court may deem just and proper.

DATED: NEW YORK, NEW YORK
May 25, 2005

/s/
GERARD M. DEENIHAN, ESQ.

To: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

ATTACHMENTS: Exhibits A and B.

Appendix E

EXHIBIT A

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK, PART 72

IND. NO.: 1982 – 2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

PERSONS:

REQUEST FOR A BILL OF PARTICULARS

In order for the defendant to properly defend against the charges in the accusatory instrument, it is essential that defense counsel be supplied with specific items of factual information not recited in the accusatory instrument, including the substance of the defendant's conduct. This is necessary because the accusatory instrument is both factually vague and conclusory in nature, and because no preliminary hearing was held.

Pursuant to C.P.L. §§ 100.45 and 200.95, a Request for a Bill of Particulars is herewith made demanding the following particulars:

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1. With respect to each and every count of the accusatory instrument, state whether:

   a. The prosecution intends to prove that defendant acted as principal, or as accomplice, or as both.

   b. If the prosecution intends to prove that defendant acted as an accomplice, then set forth separately the conduct:

      i. Of defendant that constitutes the basis of defendant's accessorial liability; and

      ii. Of each other participant that constitutes the basis of that participant's accessorial liability.

2. State the names, addresses, and birth dates of any persons with whom defendant is alleged to have acted in concert, whether such persons were arrested, and, if arrested, the docket numbers of their cases.

3. State the exact date and time of each alleged incident, and, if more than one incident is alleged, state their sequence.

4. State the exact location of each alleged incident, including any and all identifying landmarks.

5. With respect to the charge of V.T.L. 511(3) (a) (ii), Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, state the following:

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a. The exact times at which the defendant is alleged to have operated the vehicle in violation of the statute under which he is charged.

b. The exact manner in which the defendant is alleged to have operated the vehicle, including, but not limited to, whether he was driving the vehicle or sitting in the vehicle.

c. Exactly where the defendant is alleged to have operated the vehicle.

d. Who is alleged to be the owner of the vehicle that the defendant was allegedly driving, and how such ownership is known to the prosecution.

e. Whether anyone else is alleged to have been in the vehicle with the defendant at the time of his arrest, and, if so, the name and address of such person.

f. The exact date, time and nature of the suspension or suspensions that are alleged to be the basis for the charge, including, but not limited to, the cause for the issuance of any tickets or summonses, the manner in which, the date and time at which, and by whom (including the name, shield number and precinct of any police officer or officers) any such tickets or summonses were delivered to the defendant, if at all.

g. Exactly how and by whom the suspension or suspensions were made known to the defendant, if at all.

6. With respect to the arrest of defendant, state the following:

a. The exact time at which defendant was first observed by police officers on the date of the alleged offense;

b. The exact location of the police officer(s) who first observed defendant, including any and all identifying landmarks;

c. The exact time and location at which defendant was first detained and/or taken into custody by police officers;

d. The reason that the police detained defendant and/or took defendant into custody;

e. The exact time and location, including any and all identifying landmarks, at which defendant was formally placed under arrest;

f. Whether there was probable cause to arrest defendant and the basis of any such probable cause, including, but not limited to, whether the arresting officer had first-hand knowledge of the commission of the alleged crime.

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Request is further made that any refusal to supply any of the requested material be made in writing, setting forth the grounds for such refusal, and that a copy of such writing be served upon the undersigned and filed with the Court within 15 days of receipt by you of this Request for a Bill of Particulars. *See* C.P.L. § 200.95(4).

DATED: NEW YORK, NEW YORK
May 25, 2005

RESPECTFULLY SUBMITTED,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, NY 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

Appendix E

EXHIBIT B

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. NO.: 1982 - 2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

PERSONS:

DEMAND TO PRODUCE

Pursuant to C.P.L. § 240.20 defendant demands that you produce for inspection, photographing, copying or testing, the following items:

1. Any written, recorded or oral statements of the defendant, or of any alleged co-defendant, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under such public servant's direction or in cooperation with him or her,

regardless of whether the prosecution intends to offer such statement at trial and regardless of whether such statement was made under a promise of full or partial immunity.

2. Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of, a public servant engaged in law enforcement activity, or which was made by a person whom the prosecution intends to call as a witness at trial, or which the prosecution intends to introduce at trial, *including any and all reports of medical treatment received by the complaining witness(es).*

3. Any photograph or drawing relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecution intends to call as a witness at trial, or which the prosecution intends to introduce at trial.

4. Any other property obtained from the defendant, or a co-defendant to be tried jointly.

5. Any audiotapes, videotapes, or other electronic recordings including 911 tapes which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction.

6. The approximate date, time, place and circumstances of each charged offense and of defendant's arrest, including, but not limited to, the information requested in Request for a Bill of Particulars above.

7. Any statement allegedly made by the defendant or co-defendant concerning the alleged criminal incident, prior to, during or subsequent to the alleged criminal incident, whether exculpatory or inculpatory, to any person, other than as described in C.P.L. § 240.20(1) (a), and the name and address of any such person.

8. If any statements exist under paragraph 7 above, whether *Miranda* warnings were given to the defendant or co-defendant, as the case may be, and, if so, by whom, when, where, and in what manner.

9. The exact time(s) and date(s) when, and manner in which, and by whom, the police were apprised of the alleged crimes, including, but not limited to, any complaint made to the police, 911 call, walk in, "Crime Stoppers" call, or tip, and including the name and address of any and all such persons giving such information.

10. Whether an informant was used in this case, and, if so, the informant's name and address, whether the informant has received or expects to receive any payment for his or her services, whether such informant is a confidential informant with a

registered I.D. Number, specifying such I.D. Number, whether such informant has given information in the past, specifying such information and to whom such information was given on each occasion, and the exact information received from such informant in the instant case, specifying when, by whom, and the manner in which it was received.

11. The names, shield numbers, and assignments of any and all police officers and/or law enforcement personnel present at the time and place of the defendant's detention and formal arrest. *See People v. Wanda Harris*, N.Y.L.J., January 2, 1992, p. 22, col. 3 (Crim. Ct. N.Y. Co.) (Kluger, J.).

12. Whether the arresting officer or any other law enforcement official had the defendant or co-defendant under observation prior to the arrest, and, if so, for how long a period of time, the reason for such observation, and the name and shield number of any such officer or official.

13. Any and all police department reports, memoranda, or records prepared in connection with the investigation of the crime charged, and the arrest of the defendant, including, but not limited to, those made by the New York City Police Department.

14. A list of the names, addresses and birth dates of any and all prospective prosecution witnesses, prior to trial. *See People v. Rivera*, 119 A.D.2d 517, 501 N.Y.S.2d 38 (1st Dept. 1986); *People v. Arthur*, 175

Misc.2d 742, 673 N.Y.S.2d 486 (Sup. Ct., N.Y. Co. 1997); *People v. Arrellano*, 150 Misc.2d 574, 569 N.Y.S.2d 574 (Crim. Ct., N.Y. Co. 1991).

15. Whether any person identified; *or failed to identify*, the defendant or co-defendant, or identified another as the perpetrator of the alleged crimes, and the exact time, date, place and manner of any such identification or non-identification, including, but not limited to, a single photograph, a photographic array, a show-up, or a line-up, and the name and address of any such person, whether or not the prosecution intends to call that person as a witness at trial.

16. Whether any search was conducted of the defendant or co-defendant or any property or automobile in connection with this case, and, if so, the exact date, time, place and manner of any and all such searches, the basis for such search, including, but not limited to, a warrant, reasonable suspicion, probable cause, or exigent circumstances, a complete list of all items seized during any such search, and the names, addresses and birth dates of any and all persons present at any such searches.

17. Any and all specific instances of the defendant's prior charged or uncharged criminal, vicious, or immoral conduct of which the prosecution has knowledge and which the prosecution intends to use at trial.

18. A written list of the names, addresses and qualifications of any and all experts the prosecution intends to call as witnesses at trial, together with all reports prepared by such experts or, if reports have not been prepared, a brief description of the opinion and subject matter of the opinion to which each will testify.

19. Anything required to be disclosed, prior to trial, to the defendant by "the prosecution, pursuant to the Constitution of this state or of the United States, including, but not limited to, the following:

    a. Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.E.2d 104 (1972), all evidence or information in the prosecution's possession, custody or control that may tend to exculpate the defendant or impeach any person whom the prosecution intends to call as a witness at any pre-trial hearing or at trial (hereinafter "prospective prosecution witness"), including, but not limited to, the following:

        1) All records and information revealing prior convictions or guilty verdicts or juvenile adjudications, including, but not limited to, relevant "rap sheets," of any prospective prosecution witness;

        2) Whether any prospective prosecution witness has been incarcerated in a federal,

state or local correctional facility, and, if so, the prison records of such witness;

3) A complete statement of any and all criminal cases currently known by the prosecution to be pending against any prospective prosecution witness, regardless of whether such cases are the subject of promise, regard or inducement, including their NYSID number(s), pursuant to *People v. Torres*, 201 A.D.2d 294, 607 N.Y.S.2d 303 (1st Dept 1994); *People v. Santiago*, 138 A.D.2d 327, 526 N.Y.S.2d 456 (1st Dept 1988);

4) A complete statement of any and all regulatory, licensing or other governmental or quasi-governmental proceedings now pending, closed, discontinued, settled or completed against any prospective prosecution witness;

5) A complete statement of any and all criminal conduct of which the prosecution has knowledge that has been committed by any prospective prosecution witness concerning which there has been no conviction, regardless of whether these crimes are the subject of a promise, reward or inducement, and regardless of whether these crimes are the subject of a pending criminal charge;

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6) A complete statement of any consideration or promises of consideration given or offered during the course of the investigation and preparation of this action by any law enforcement officials, including prosecutors, police or informers, to any prospective prosecution witness, or to anyone assisting in the investigation leading up to the instant action, or any such consideration or promise of consideration expected or hoped for by any such person, including, but not limited to:

i) leniency, immunity, favorable treatment or recommendations with respect to any past, pending or potential criminal, parole, probation, pardon, clemency, civil, administrative, forfeiture, immigration, licensing or other matter involving local, state or federal government or quasi-governmental authority;

ii) relief from forfeiture, payments of money, rewards, fees, witness fees or special witness fees;

iii) provisions of food, clothing, transportation, legal services or other benefits;

iv) placement in a "witness-protection program";

v) letters to anyone informing the recipient of the witness's cooperation;

vi) recommendations concerning federal or state aid or benefits;

vii) recommendations concerning licensing, certification or registration;

viii) promises to take affirmative action to help the status of the witness in a profession, business or employment situation or promises not to jeopardize such status;

ix) aid or efforts in securing or maintaining the business or employment of a witness;

x) anything else that arguably could reveal an interest, motive or bias in the witness in favor of the prosecution or against the defendant, or could act as an inducement to testify, or could color the witness's testimony (*see People v. Grice*, 188 A.D.2d 397, 591 N.Y.S.2d 380 (1st Dept 1992);

7) A complete statement of any and all threats, whether express or implied, direct or indirect, or other coercion, directed against any prospective prosecution

witness, including, but not limited to, criminal prosecutions, forfeiture actions, or investigations; the probationary, parole, deferred prosecution or custodial status of any such witness; and any civil, tax court, court of claims, administrative, immigration, or other pending or potential legal disputes or transactions involving any such witness and the state or federal government or over which the state or federal government has real, apparent or perceived influence;

8) A copy of any and all medical and psychiatric reports or information, or records of hospitalization, including any history of alcoholism or substance abuse, known to the prosecution or that can reasonably become known to the prosecution concerning any prospective prosecution witness that arguably pertain to the witness's credibility or ability to perceive, comprehend or recall events;

9) Any written or oral statements made by any prospective prosecution witness that in any way contradict or are inconsistent with other written or oral statements he or she has made, and any such statements made by any person, whether a prospective prosecution witness or not, that in any way contradict or are inconsistent with such statements made by a prospective witness;

10) The same records and information specified in subparagraphs (1) through (9) with respect to each non-witness declarant whose statements will be offered in evidence at any pretrial hearing or at trial; and

11) Copies of any and all records of law enforcement or other governmental agencies reflecting intradepartmental disciplinary action taken against any law enforcement or agency official who will testify in this action, including all such records from any governmental agency for which the witness previously worked.

b. Pursuant to *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), any and all prior statements, complete and without any redaction, of any prospective prosecution witness.

Demand is further made that any refusal to supply any of the requested material be made in writing, setting forth the grounds for such refusal, and that a copy of such writing be served upon me and filed with the Court within 15 days of receipt by you of this Demand for Discovery. *See* C.P.L. §§ 240.35 and 240.80.

DATED: NEW YORK, NEW YORK
May 25, 2005

Appendix E

RESPECTFULLY SUBMITTED,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, NY 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

APPENDIX F— AFFIRMATION IN RESPONSE TO THE PETITIONER'S OMNIBUS MOTION, FILED IN NEW YORK COUNTY SUPREME COURT ON JUNE 22, 2005

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 72

Indictment No. 01982-2005

PEOPLE OF THE STATE OF NEW YORK,

- against -

JOSE TOLENTINO,

Defendant.

AFFIRMATION IN RESPONSE TO THE DEFENDANT'S OMNIBUS MOTION

Joanne Li, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am the Assistant District Attorney in New York County assigned to this case and am familiar with its facts.

2. This affirmation is submitted in response to the defendant's omnibus motion in which the defendant seeks inspection of the Grand Jury minutes and the dismissal of the indictment, pretrial discovery, suppression of identification testimony, suppression of

physical evidence, a Dunaway hearing, a Sandoval hearing, and in support of the People's request for reciprocal discovery.

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS THE INDICTMENT

3. The People consent to the Court's *in camera* review of the Grand Jury minutes. Inspection will reveal that the evidence before the Grand Jury amply supports the offense(s) charged, that the Grand Jury was properly instructed on the law, and that the integrity of the proceedings was unimpaired. The People deny all allegations to the contrary and oppose disclosure of the Grand Jury minutes to the defense. The issues raised in the defendant's motion are straightforward, and disclosure is not necessary to their resolution CPL §210.30(3).

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION FOR PRETRIAL DISCOVERY

4. The Voluntary Disclosure Form ("VDF") provides all of the pretrial discovery to which the defendant is entitled. As explained more fully below, the other items the defendant seeks are not discoverable. *See, People v. Colavito*, 87 N.Y.2d 423, 427 (1996) (items not enumerated in CPL §240 are not discoverable as a matter of right unless constitutionally or otherwise specially mandated); *See, Matter of Constantine v. Leto*, 77 N.Y.2d 975 (1991); *Matter of Miller v. Schwartz*, 72

N.Y.2d 869, 870 (1988) (discovery matters are "regulated by statute"; thus where a defendant has no statutory right to pretrial discovery, the defendant request should be denied).

5. The defendant seeks statements that the defendant made to persons other than law enforcement officials or their agents. Such statements and information related to them are not discoverable. *See* CPL §240.20(1)(a).

6. The defendant requests prior statements of the People's witnesses. These statements are not discoverable at this time. *See People v. Allen*, 108 A.D.2d 601, 602 (1st Dept. 1985) ("[t]here is no requirement that the People furnish *Rosario* material to a defendant prior to commencement of trial"). They will be provided to the defendant to the extent and at the time prescribed by law. *See* CPL §§240.44(1) and 240.45(1)(a).

7. The defendant requests numerous police reports. These reports are not discoverable at this time. *See* CPL §§240.20 and 240.45.

8. The defendant requests the personnel files of potential police witnesses. These files are not discoverable absent a showing of "some factual predicate which would make it reasonably likely" that the files contain impeachment material. *See People v. Gissendanner*, 48 N.Y.2d 543, 550 (1979); Civil Rights Law §50a. No such showing has been made in this case.

9. The defendant requests information regarding potential police witnesses and their investigative activities. This information is beyond the scope of pretrial discovery.

10. The defendant requests the names and addresses of the People's non-police witnesses. A witness list is not discoverable under CPL §240.20 and is not "other property" under CPL §240.40.

11. The defendant requests the dates of birth and/or criminal records of the People's non-police witnesses. These materials are also not discoverable at this time and will be provided as prescribed by law. *See* CPL §§240.44(2) (3) and 240.45(1) (b) (c).

12. The defendant requests evidence tending to impeach the People's non-police witnesses. Mere impeachment evidence is not the proper subject of pretrial discovery. *See* CPL §§240.20, 240.40.

13. The defendant requests exculpatory material within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963). The People are aware of their continuing duty under *Brady* to disclose exculpatory evidence to the defense and will honor that obligation.

Appendix F

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

14. The People do not intend to introduce at trial testimony of any witness who previously identified the defendant. A *Wade* hearing is therefore unnecessary.

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

15. As the VDF indicates, the People do not intend to offer at trial certain tangible evidence. A *Mapp* hearing is therefore unnecessary.

PEOPLE'S RESPONSE TO THE DEFENDANT'S DUNAWAY MOTION

16. The defendant has moved to suppress the DMV abstract of the defendant. The evidence was lawfully obtained, and the People deny all allegations to the contrary. Moreover, the defendant is not entitled to a hearing on the defendant's motion to suppress, because the defendant's motion does not establish a factual dispute requiring a hearing. *See* CPL §710.60(1); *People v. Mendoza*, 82 N.Y.2d 415 (1993); *People v. Marte*, 207 A.D.2d 314 (1st Dept. 1994) (suppression motion properly denied without a hearing when the defendant's allegations do not dispute the sufficiency of probable cause for the arrest). As the Court of Appeals has observed, a defendant's allegations, while facially sufficient, "may be inadequate when read in the context

of the case." *People v. Mendoza*, 82 N.Y.2d at 427. Here, the defendant fails to specifically deny the facts in this case. Notably, the defendant does not dispute the facts set forth in the case information sheet, complaint, VDF, and/or indictment. Plainly, however, those sources specified that the defendant was stopped for playing loud music from his vehicle. All of this information was "susceptible to denials that would have identified any issues warranting a hearing." *People v. Toxey*, 220 A.D.2d 204, 205 (1st Dept. 1995). The defendant's failure to deny the facts that establish probable cause "may be deemed a concession," and thus, a hearing is unnecessary. *People v. Mendoza*, 82 N.Y.2d at 428. Accordingly, the defendant's motion to suppress said abstract and for a *Dunaway* hearing should be denied.

17. The defendant has moved to suppress defendant's identity and documents independently kept by the Department of Motor Vehicles (hereinafter "DMV") that will be introduced at trial. In the alternative, the defendant has requested a *Dunaway* hearing on the suppression of this evidence. *Dunaway v. New York*, 442 U.W. 200 (1979). The People deny that the defendant was illegally stopped, apprehended, and/or arrested. However, even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule. Therefore this evidence should not be suppressed.

18. The exclusionary rule was created to serve as a deterrent to illegal police conduct. The intent behind

the rule was to prevent law enforcement officials from using illegally obtained "fruits" against the defendant, and thus to prevent illegal police action by imposing a harsh and immediate sanction on law enforcement. *United States v. Crews*, 445 U.S. 463 (1980); *People v. Young*, 55 N.Y.2d 419, *cert. denied sub nom., Young v. New York*, 459 U.S. 848 (1982). However, before such a harsh sanction is imposed, the rule is balanced against the effect of the exclusion on the truth finding process. *People v. McGrath*, 46 N.Y.2d 12, 21 (1978), *cert. denied sub nom., McGrath v. New York*, 440 U.S. 972 (1979).

19. The rationale behind the balancing test has been outlined by the United States Supreme Court. "The 'body' or *identity* of a defendant ... is never itself suppressible as fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (emphasis added); *accord, United States v. Adegbite*, 846 F.2d 834, 838-39 (2nd Cir. 1988) (court refused to suppress defendant's name because a defendant's identity is not suppressible under the exclusionary rule); *United States v. Gonzalbo*, 946 F. Supp. 287, 289 (S.D.N.Y. 1996) (even if police learned defendant's identity as a result of an illegal stop of defendant's car, defendant's conviction for driving with a suspended license would be upheld because a defendant's identity is never suppressible under the exclusionary rule); *People v. Young*, 55 N.Y.2d 419, *cert. denied sub nom., Young v. New York*, 459 U.S. 848 (1982) (distinguishes between admissible observations by police during illegal arrest and inadmissible tainted

evidence recovered as result of illegal stop); *see also, Oliver v. United States*, 656 A.2d 1159, 1171 n.20 (D.C. App. 1995). Consequently, "there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence." *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) *cert. den.* (internal quotation marks omitted). Accordingly, because the motor vehicle records at issue here were obtained after the discovery of the defendant's identify which is not subject to suppression, those records should not be suppressed, irrespective of the legality of the stop.

20. Moreover, because the DMV records the defendant seeks to suppress were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested, they are not the product of the stop, apprehension or arrest, and should not be suppressed pursuant to the exclusionary rule. *See, United States v. Crews*, 445 U.S. 463, 475-77 & n.22 (1980) ("The exclusionary rule enjoins the government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.") (plurality opinion); *People v. Pleasant*, 54 N.Y.2d 972, 974 n.* (1981) (photograph of defendant retrieved by the police from the Bureau of Criminal identification was not the fruit of defendant's illegal arrest because the photograph had been in the Bureau's files prior to the arrest), *cert. denied sub nom., Pleasant v. New York*, 455 U.S. 924 (1982); *People v. Bargas*, 101 A.D.2d 751, 752 (1st Dept. 1984) (computer record,

indicating car in which defendants had been driving was stolen, was not the fruit of the illegal stop because "the police computer's stolen car information had been independently compiled"); *People v. Smith*, 170 Misc.2d 486, (Crim. Ct. N.Y. Co. 1996) (holding that preexisting DMV records were not a suppressible fruit of an illegal car stop); *Bynum v. United States*, 274 F.2d 767, 767 (D.C. Cir. 1960) (fingerprint records of the defendant that predated his illegal arrest were not suppressible the fruit of that arrest); *State v. Levya*, 599 So.2d 691, 694 & n.7 (Fla. App. 3rd Dist. 1992) (preexisting public record that showed that defendant's driver's license had been suspended was not suppressible as the fruit of an illegal stop).

21. More importantly, the effectiveness of the exclusionary rule will not be diminished by excluding the DMV records from its application. In considering whether or not the exclusionary rule is applicable, "courts must 'weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.'" *People v. Cobb*, NYLJ, 12/3/97, p. 33, col. 5 (Crim. Ct. Kings Co.) (DiMango, J.) (citing *United States v. Janis*, 428 U.S. 433 (1976)). In *Cobb*, the court went through a thorough analysis as to whether or not the stop was illegal and, if it was, whether the records were subject to exclusion. Although, the *Cobb* court found the stop in that case to be proper, it added that even if the stop had been improper, the defendant's suppression motion should have been denied without a hearing. In reaching this conclusion, the court in *Cobb* reasoned, "where 'there is no sanction to be applied when an illegal

arrest only leads to a man's identity and that merely leads to the official file or other independent evidence,' then a fortiori, to require a hearing where the only issue to be determined is the admissibility of the DMV abstract is superfluous." *Id.* (citing *Hoonsilappa v. INS*, 575 F.2d 735, 738 (1978)). In *People v. Smith*, supra, the court actually found the automobile stop to be improper under *Ingle*, but still held that the records from DMV were admissible because they were clearly not the subject of the exclusionary rule. *Smith*, supra, at 316-17. *Contra*, *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct. N.Y. Co. 1995) (Cataldo, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct. N.Y. Co. 1995) (Parker, J.).

22. In contrast, the court in *Thomas*, supra, held that suppression of DMV is the only sanction that will give effect to the exclusionary rule. In reaching this conclusion, the court in *Thomas* relied on *People v. Ingle*, 36 N.Y.2d 413 (1975). *Ingle*, however, deals with the legality of checkpoints, not whether or not evidence seized pursuant to an unlawful automobile stop is subject to the exclusionary rule. In fact, the court in *Cobb* reached the opposite conclusion after taking *Ingle* into account because of the fact that the People are already subject to significant sanctions resulting from improper automobile stops such as the suppression of post arrest statements, recovery of physical evidence and suggestive identification procedures. *Cobb*, supra. Moreover, the information obtained from DMV records will not be affected by the illegal police procedure -- the information existed before the improper stop and will continue to exist after it. *See, Young*, supra, at 425-26; *Cobb*, supra. Consequently, the sanction of suppressing

the defendant's identity and records generated by a non-police agency is extreme and of minimal deterrence.

23. For all the reasons stated above, the People respectfully request that this court follow the holdings in *Cobb*, supra, and *Smith*, supra, and deny defendant's motion to suppress defendant's identity and DMV records without a *Dunaway* hearing.

PEOPLE'S RESPONSE TO THE DEFENDANT'S REQUEST FOR SANDOVAL HEARING

24. The People respectfully request that this matter be deferred for consideration by the trial judge. Immediately prior to the commencement of trial, the People will provide notice of prior uncharged criminal, vicious, or immoral acts that the prosecutor intends to use at trial to impeach the credibility of the defendant. *See* CPL §240.43.

PEOPLE'S REQUEST FOR RECIPROCAL DISCOVERY

25. Pursuant to CPL §250.20, the People hereby demand that the defendant supply (a) the place or places where the defendant claims to have been at the time of the commission of the crime, and (b) the names, residential addresses, places of employment and addresses thereof of every alibi witness upon whom the defendant intends to rely to establish the defendant's presence elsewhere than at the scene of the crime at the time of its commission.

Appendix F

26. Pursuant to CPL §240.30(1), the People hereby demand that the defendant supply (a) any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test, experiment, or comparisons, made by or at the request or direction of the defendant, if the defendant intends to introduce such report or document at trial, or if the defendant has filed a notice of intent to proffer psychiatric evidence and such report or document relates thereto, or if such report or document was made by a person, other than the defendant, whom the defendant intends to call as a witness at trial; and (b) any photograph, drawing, tape, or other electronic recording which the defendant intends to introduce at trial.

27. More than 30 days have elapsed since the defendant pleaded not guilty to the indictment and the defendant has not served notice of an intention to present psychiatric evidence at trial. Accordingly, the defendant should be precluded from presenting such evidence. *See*, CPL §250.10(2).

Wherefore, it is respectfully requested that, except as consented to herein, the defendant's motion should be denied.

Respectfully submitted,
/s/_____
Joanne Li
Assistant District Attorney
(212) 335-9174

Dated: New York, New York
June 20, 2005

APPENDIX G — OPINION OF THE NEW YORK COUNTY SUPREME COURT, ENTERED JULY 12, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

Indictment No.
1982/2005

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOSE TOLENTINO,

Defendant.

DECISION & ORDER

R. UVILLER, J.:

Defendant's motion for multiple relief is disposed of as follows:

Inspection of Grand Jury Minutes (and/or dismissal): The defendant's motion is granted solely to the extent of the Court reviewing the minutes of the proceedings

before the Grand Jury *in camera*. Upon its review of the Grand Jury minutes, the Court finds that sufficient evidence was presented by the People to the Grand Jury to sustain the indictment and that the Grand Jury proceedings were not otherwise defective or impaired. The defendant's request for release and inspection the Grand Jury minutes is denied.

Bill of Particulars and Discovery: The defendant's motion for a bill of particulars and discovery is granted to the extent supplied by the People. The bill of particulars and discovery provided by the People is deemed adequate. *However, if the defendant believes that any response to his demand for discovery or his request for a bill of particulars is inadequate, after conference with the assistant district attorney and his request for additional disclosure having been refused by the People, he may move to reargue within ten days of the service of a copy of this Decision and Order, by providing a written particularization setting forth the additional information that he seeks and the legal basis for the receipt of such information.* The People are reminded of their continuing obligation under *Brady v. Maryland* (373 U.S. 83). The defendant is directed to comply with the People's reciprocal demand for discovery. If the defendant objects to any part of the People's demand, he shall make a written objection and submit such to the Court within ten days of the service of a copy of this Decision and Order.

Motion to Suppress Statements and/or Huntley/ Dunaway Rearing: A hearing is granted with respect to both voluntariness and probable cause.

Appendix G

Motion to Suppress Tangible Evidence or Mapp Hearing: A *Mapp* hearing is **denied**. An individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis. See, *People v. Sajous*, 180 Misc.2d 693, *lv denied*, 93 NY2d 1026; *People v. Cobb*, 182 Misc.2d 188; *People v. Smith*, 170 Misc.2d 486, 492; *People v. Comas*, 2003 NY Slip Op 51067U (Crim. Ct NY County, June 26, 2003). See also, *United States v. Guzman-Bruno*, 27 F.3d 420, *cert denied* 115 S. Ct. 451.

Motion to Preclude Prior Bad Acts: The defendant's motion to preclude is denied. However, a *Sandoval* hearing is granted and shall be held by the trial court immediately prior to jury selection.

Application to File Additional Motions: The defendant's application to file additional motions is denied without prejudice. The defendant is granted leave to renew such application if the defendant can adequately demonstrate the necessity of such motion(s) pursuant to CPL §255.20(3).

This constitutes the Decision and Order of this Court.

DATED: July 12, 2005 /s/
RENA K. UVILLER, J.S.C.

PEOPLE: ADA Joanne Li
DEFENSE: Gerard M. Deenihan, Esq.

APPENDIX H — GUILTY PLEA PROCEEDING TRANSCRIPT, DATED AUGUST 3, 2005

[1] SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK:
CRIMINAL TERM: PART: 72

Indictment No.: 1982/05

VTL 511.3A(3)

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOSE TOLENTINO,

Defendant.

Plea

100 Centre Street
New York, New York 10013
August 3, 2005

BEFORE:

HONORABLE RENA K. UVILLER,

Justice

Appendix H

APPEARANCES:

FOR THE PEOPLE:

ROBERT M. MORGENTHAU, ESQ.
District Attorney, New York County
One Hogan Place
New York, New York 10013
BY: JOANNE LI, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

THE LEGAL AID SOCIETY
49 Thomas Street
New York, New York 10013
BY: GERARD DEENIHAN, ESQ.

JACQUELINE RODRIGUEZ, CSR, RPR
Senior Court Reporter

[2] COURT CLERK: Calendar No. 15, Jose Tolentino.

MS. LI: Joanne Li, for the People.

MR. DEENIHAN: On behalf of Mr. Tolentino, Legal Aid Society, by Gerard Deenihan, D-E-E-N-I-H-A-N.

Good morning.

THE COURT: Good morning.

MR. DEENIHAN: Judge, I've spoken with Ms. Li, who is the assigned assistant on this case, and Mr. Tolentino is interested in disposing of this today.

MR. DEENIHAN: I would, if you'd like me to, and if you'd like to see the paperwork, I have it to give it to you.

Mr. Tolentino has appeared on all of his tickets. Thirty-eight of them have already been dismissed. He has dates to return on 21 more. It looks like they will all likely be dismissed. He has all the dates here.

THE COURT: So, in other words, he has been paying off those tickets?

MR. DEENIHAN: He hasn't been able to pay them off because DMV has been dismissing them. Thirty-eight have been completely dismissed. So, as such, he doesn't owe anything.

[3] He has dates to appear on 21 tickets. It looks like they will be dismissed.

THE COURT: They're dismissed on what ground?

MR. DEENIHAN: I think that part of it is that they're old. So, I'm not sure if the police are going to go forward on it or something along those lines, but I have all the paperwork showing the dismissals.

Appendix H

THE COURT: Ms. Li, do you have any position on this?

MR. DEENIHAN: Your Honor?

THE COURT: Have you looked at those dismissals?

MS. LI: No, I did not. However, I've had discussions with Mr. Deenihan about this.

Although they have been dismissed, it does not diminish the fact that his license was suspended, and suspended since 1983, for failure to answer summonses and failure to pay child support.

For this reason, the People are recommending a plea to the charge and six months jail.

MR. DEENIHAN: There is no issue about his license being suspended. Mr. Tolentino is finally on [4] his way to clearing up this matter.

I would ask that you consider something that doesn't involve incarceration, given that Mr. Tolentino has been out of trouble for 15 years.

In 1990, he had a misdemeanor conviction and a conditional discharge.

THE COURT: You think you're above the law?

Will you please stand, sir.

(Defendant complied.)

THE COURT: Do you think the law doesn't apply to you, that you can just not pay your tickets and not appear, you just walk on your merry way?

THE DEFENDANT: I've been paying all the tickets, your Honor.

THE COURT: This is what I'm going to do.

I will give him a probationary sentence, but it is going to be on the condition that he demonstrate to the probation department -- he does not have a license now; is that correct?

MR. DEENIHAN: That's correct.

THE COURT: I'm going to ask them to check with DMV. If you're caught behind the wheel of a car, if I accept this plea, I will put you in jail. If you get into a car again to drive it and you're stopped and I find out about it, which I will, I will [5] give you a jail sentence of up to four years.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: With those conditions, is he ready to enter a plea?

Appendix H

(Defendant and Defense Counsel conferring.)

THE COURT: And his license has been suspended since when?

MS. LI: 1983, your Honor.

THE COURT: I just want to make it clear that if I accept this plea -- he's been driving.

The law requires you to have a license, and you won't get a license until you take care of your tickets.

If I accept this plea, and I'll have Probation check, and if I find out that you have been driving, they will notify me, you're going to be violated, and I'm going to put you in jail.

You are not to drive. You can take a taxi or walk if you want, but do not drive.

Do not get involved in this plea, sir, if you think you're going to get into a car and drive.

MR. DEENIHAN: This is just as long as his license is suspended?

THE COURT: Yes, that's correct.

[6] (Defendant and Defense Counsel conferring.)

THE COURT: If he's not interested, let's just set a trial date.

MR. DEENIHAN: He may be.

Could we possibly have a second call?

THE COURT: Second call this case. I have other things to do.

* * *

COURT CLERK: Recall on calendar No. 15, Jose Tolentino.

MR. DEENIHAN: Legal Aid Society, by Gerard Deenihan.

I've discussed the Court's offer with Mr. Tolentino. He's prepared to accept it.

At this time, after speaking with Mr. Tolentino, he has authorized me to withdraw any previously entered pleas of not guilty, and enter a plea of guilty, under Indictment 1982 of 2005, to the first count of VTL 511.3A(2), in full satisfaction of the indictment, with a term of probation as promised by the Court.

THE COURT: As I recall from this morning, if he is found driving a car before all of his suspensions are taken care of, he will face a prison sentence.

[7] Does he understand that?

MR. DEENIHAN: Yes.

THE COURT: Mr. Tolentino, will you please stand.

(Defendant complied.)

THE COURT: Your lawyer tells me that you wish to plead guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: Before taking a plea by you, I am required by law to explain and ask you some questions. If I ask you or say anything to you which you don't understand, tell me and I'll make it clear for you.

First of all, raise your right hand.

(Defendant sworn in.)

THE COURT: Okay. Thank you.

State your true and full name and your age.

THE DEFENDANT: Jose Tolentino. Forty-four.

THE COURT: Have you talked to your lawyer, Mr. Deenihan, about this decision to plead guilty?

THE DEFENDANT: Yes, I have.

THE COURT: Has anyone pressured you or forced you to get you to plead?

THE DEFENDANT: No.

[8] THE COURT: You understand this is a felony conviction under the Vehicle and Traffic Law, and if you ever get convicted of a felony, under the Penal Law it would be a mandatory state sentence.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: By pleading guilty, you're giving up the right to have a jury decide this case; you're giving up the right to have witnesses come to court and testify against you and to be cross-examined by your lawyer; you're giving up any defenses or excuses you might have told to the jury; and, finally, if you went to trial, you could have remained silent and made the prosecutor prove the case against you.

If you plead guilty, you have to admit to this crime.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: You also understand that at trial you may not have been found guilty, but if you had been found guilty, you would have faced up to four years in prison.

Do you understand that?

THE DEFENDANT: Yes ma'am.

[9] THE COURT: If I take this plea, I'm going to watch this case.

Did I say deferral here or probation with a violation to be brought --

MR. DEENIHAN: I'm sorry?

THE COURT: I can't remember whether I said probation right off or a deferral.

MR. DEENIHAN: I believe you said probation, and during the probation if he was to drive with a suspended license --

THE COURT: All right. The promise will be a term of probation on two conditions.

First, that you not get arrested for anything in the meantime, and that you come back here on the day I tell you for the sentence to be imposed.

If you are arrested for anything, you're facing up to four years in state prison. You will not get your plea back.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, lastly, when you're placed on probation, it will be a condition of probation that you're not to be behind the wheel of a car until it has been proved that all of your suspensions have been paid.

[10] Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And given your history, I'm warning you, Mr. Tolentino, you're not just going to get off scot-free. You will pay the price if I find out that you're driving again.

Do you have any questions?

THE DEFENDANT: No.

THE COURT: You're charged with aggravated unlicensed operation of a motor vehicle.

The indictment alleges that in New York County, on January 1, 2005, you operated a motor vehicle while having, in effect, ten or more suspensions that were imposed on at least ten different dates for failure to answer these summonses or pay a fine.

Do you understand what you're accused of?

THE DEFENDANT: Yes, ma'am.

THE COURT: How do you plead to this unclassified C felony; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Please listen to the clerk.

COURT CLERK: Mr. Tolentino, do you now withdraw your previously entered plea of not guilty, and do you now enter a plea of guilty to aggravated [11] unlicensed operation of a motor vehicle in the first degree, to satisfy Indictment 1982 of 2005?

Is that your plea, guilty?

THE DEFENDANT: Yes.

MR. DEENIHAN: How's 9/28?

THE COURT: Let's see. September 28th is fine.

MR. DEENIHAN: Thank you.

* * *

I, Jacqueline Rodriguez, a Certified Shorthand Reporter, in and for the State of New York, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill, and ability.

/s/_____
Jacqueline Rodriguez, CSR, RPR
Senior Court Reporter

APPENDIX I — SENTENCING TRANSCRIPT, DATED SEPTEMBER 28, 2005

[1] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, PART 72

Indictment No. 1982/05

PEOPLE OF THE STATE OF NEW YORK,

- vs. -

JOSE TOLENTINO,

Defendant.

September 28th, 2005
100 Centre Street
New York, N.Y.

BEFORE:
HONORABLE RENA K. UVILLER, J.S.C.

APPEARANCES:

For the People:
ROBERT MORGENTHAU, ESQ.,
New York County District Attorney
One Hogan Place
New York, New York 10013
BY: DAISY MEJIA, ESQ.,
Assistant District Attorney

For the Defendant:
LEGAL AID SOCIETY
49 Thomas Street
New York, New York 10013
BY: GERARD DENNEHAN, ESQ.

[2] THE CLERK: Number 41, from the audience, Jose Tolentino.

MS. MEJIA: Daisy Mejia for the People.

MR. DENNEHAN: Legal Aid Society by Gerard Dennehan.

THE COURT: Mr. Dennehan, Miss Mejia, I would want you to come up for a moment.

(WHEREUPON, counsel for both sides approached the bench and a sidebar discussion was conducted off the record, after which the following occurred in open court:)

THE COURT: Proceed to sentence.

THE CLERK: Mr. Tolentino, you're before the Court for sentencing following your conviction by plea to the charge of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. Before being sentenced --

THE COURT: Would you please stand.

THE CLERK: -- before being sentenced, the Court will allow you, your attorney and the district attorney an opportunity to address the Court with any matter relevant to sentence.

People.

MS. MEJIA: People rely upon the [3] sentence.

THE COURT: Mr. Dennehan, anything that you and or Mr. Tolentino wish to add?

MR. DENNEHAN: No.

THE COURT: I am placing Mr. Tolentino on probation for five years.

There's a mandatory $500.00 fine that goes with this and the condition is he is not to be driving a car for the next five years.

Do you understand that? Unless he's paid every single one of his summonses. If he is arrested for unlicensed operation during this next period of time, I will give you a prison sentence. Do you understand that?

THE DEFENDANT: I would like to say something, Mr. Dennehan didn't say anything.

MR. DENNEHAN: He just wants to say all the tickets have been dismissed.

THE COURT: If they have, that's one thing. If they haven't and you are behind the wheel of a car and you're arrested for unlicensed operation of a motor vehicle, that would be a violation of probation and you'll get a prison sentence.

Five years probation and $500.00 fine.

[4] MR. DENNEHAN: At this time I'm handing Mr. Tolentino his right to appeal.

(WHEREUPON, the sentence in this matter is concluded.)

CERTIFIED TO BE A TRUE
AND ACCURATE TRANSCRIPT

/s/

GLENN GREENSPAN,
Senior Court Reporter

APPENDIX J — OPINION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, ENTERED FEBRUARY 24, 2009

NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

Ind. 1982/05

The People of the State of New York,

Respondent,

-against-

Jose Tolentino, etc.,

Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 28, 2005, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

Appendix A

The court properly denied, without granting a hearing, defendant's motion to suppress Department of Motor Vehicles records relating to the suspension of his driver's license. Defendant moved to suppress these records as fruits of an allegedly unlawful vehicular stop, during which the police obtained defendant's pedigree information and thereby obtained his DMV information through a computer check.

Although a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights, we agree with those courts (*see e.g. People v. Cobb*, 182 Misc 2d 808 [Crim Ct, Kings County 1997]) that have concluded that DMV records are not suppressible fruits. "The ... identity of a defendant ... is never itself suppressible as a fruit of an unlawful arrest ..." (*Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 US 1032, 1039 [1984]). Thus, "there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file" (*United States v. Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994], *cert denied* 513 US 975 [1994] [internal quotation marks omitted]). Furthermore, the DMV records were compiled independently of defendant's arrest (*see People v. Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982]; *People v. Bargas*, 101 AD2d 751, 752 [1984]).

We perceive no basis for reducing the sentence.

Appendix J

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 24, 2009

/s/
CLERK

APPENDIX K — OPINION OF THE NEW YORK COURT OF APPEALS, ENTERED MARCH 30, 2010

COURT OF APPEALS OF NEW YORK

People v. Tolentino
14 N.Y.3d 382, 900 N.Y.S.2d 708
NY, 2010.

14 N.Y.3d 382926 N.E.2d 1212, 900 N.Y.S.2d 708,
2010 WL 1189408, 2010 N.Y. Slip Op. 02643

The People of the State of New York,

Respondent,

v.

Jose Tolentino, Also Known as Jose R. Tolentino,

Appellant.

Argued February 10, 2010
Decided March 30, 2010

OPINION OF THE COURT

Read, J.

At about 7:40 p.m. on New Year's Day in 2005, defendant Jose Tolentino was driving a car in the vicinity of West 181st Street and Broadway in New York City. The police stopped him for playing music too loudly, learned his

name, and ran a computer check of Department of Motor Vehicles (DMV) files to look up his driving record. When this check revealed that defendant's license was suspended with at least 10 suspensions imposed on at least 10 different dates, he was arrested and charged with one count of aggravated unlicensed operation of a motor vehicle in the first degree.

As part of an omnibus motion, defendant sought to suppress his driving record and any statements made after arrest; alternatively, he asked Supreme Court to hold a *Mapp/Dunaway* and/or a *Huntley/Dunaway* hearing. Defendant alleged that the police unlawfully stopped his car and illegally obtained his driving record from DMV. Specifically, he contended that his driving record was a suppressible fruit of a Fourth Amendment violation because "[t]he steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number." As a result, defendant argued, "[b]ut for defendant's unlawful seizure by the police, his DMV records would not have been obtained in this case, and they are therefore the fruit of the police illegality." The People opposed the motion, first on the ground that the stop was legal; second, they took the position that, even if the stop were, in fact, illegal, a defendant's identity is never a suppressible fruit, and, in any event, a public agency possessed the records.

On July 12, 2005, Supreme Court granted defendant's motion for a *Huntley/Dunaway* hearing, but denied his request for a *Mapp* hearing. The judge held that "[a]n

individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis." On August 3, 2005, defendant pleaded guilty to the crime charged in exchange for five years' probation; on September 28, 2005, Supreme Court sentenced him as promised.

Defendant appealed, claiming that because his driving record was suppressible, he was entitled to a remand for a hearing. The Appellate Division disagreed and unanimously affirmed (59 AD3d 298 [1st Dept 2009]). The court relied on the United States Supreme Court's decision in *INS v. Lopez-Mendoza* (468 US 1032, 1039 [1984]) for the proposition that the identity of a defendant is never suppressible as the fruit of an unlawful arrest. And because defendant's identity led to the discovery of his DMV records, those records were likewise not suppressible. Finally, the Appellate Division noted that the records had been compiled independently of defendant's arrest. A Judge of this Court granted defendant permission to appeal (12 NY3d 860 [2009]), and we now affirm.

In *INS v. Lopez-Mendoza* (468 US at 1039) the Supreme Court held that the "'body' or identity of a defendant ... in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." A contrary holding would "permit[ ] a defendant to hide who he is [and] would

undermine the administration of the criminal justice system" (*United States v. Farias-Gonzalez*, 556 F3d 1181, 1187 [11th Cir 2009]). Accordingly, defendant does not argue that his name or identity would be subject to suppression as a fruit of the allegedly unlawful stop. Rather, he claims that the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records.

Federal circuit courts addressing this issue in the context of those suspected of illegally residing in the country have held that, when the police stop or seize a defendant, learn his or her name, and use that name to check preexisting government immigration files, the records are not subject to suppression (*United States v. Farias-Gonzalez*, 556 F3d at 1189; *United States v. Bowley*, 435 F3d 426, 430-431 [3d Cir 2006]; *United States v. Roque-Villanueva*, 175 F3d 345, 346 [5th Cir 1999]). For example, in *Hoonsilapa v. Immigration & Naturalization Serv.* (575 F2d 735, 737 [9th Cir 1978]), the government sought to deport an alien after learning from his INS administrative file that he was in the country illegally. The alien moved to suppress the file, arguing that it was the "fruit" of an illegal search and arrest (*id.*). The Ninth Circuit rejected the argument, noting that the alien's INS file was already in the possession of the government at the time of the purportedly illegal arrest and search, and that the government's "decision to search the INS files was only the 'product' of the discovery of [the alien's] identity during the illegal arrest and search" (*id.* at 738). The

court emphasized that "the mere fact that Fourth Amendment illegality directs attention to a particular suspect does not require exclusion of evidence subsequently unearthed from independent sources" *(id.)*.

The facts here are analogous. The officers learned defendant's identity when they stopped his car; that knowledge permitted the police to run a computer check that led to the retrieval of defendant's DMV records. Under the rationale of *Lopez-Mendoza* and the above federal circuit court decisions, defendant's DMV records were therefore not suppressible as the fruit of the purportedly illegal stop. In short, "there is no sanction ... when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence" *(United States v. Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994] [citation and internal quotation marks omitted]).

While not forming an independent basis for this outcome, the result is further supported by the nature of the records at issue, which were public records already in the possession of authorities (*United States v. Crews*, 445 US 463, 475-477 and 475 n 22 [1980 plurality op] ["(t)he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality"]; *see also Matter of Jason W.*, 272 AD2d 214 [1st Dept 2000]; *People v. Bargas*, 101 AD2d 751, 752 [1st Dept 1984]).

Appendix K

In *People v. Pleasant* (54 NY2d 972 [1981]), we applied similar principles to deny exclusion of independently-compiled information in the possession of a public agency. There, the defendant was illegally arrested in Suffolk County for weapon possession, at which time the police discovered that one of the guns recovered during the unlawful arrest had been used in a robbery in Bronx County. Suffolk County authorities conveyed this information, along with the defendant's name and date of birth, to the Bronx police. The Bronx police then retrieved the defendant's photograph from the Bureau of Criminal Identification and showed it to the robbery victims, who positively identified the defendant from a photographic array. After the defendant was arrested on a warrant, one of the robbery victims identified him in a lineup.

We rejected the defendant's claim that the photographic identifications should be suppressed as the fruit of the illegal arrest, holding that "only defendant's identity was obtained as a result of the unlawful seizure" and the photographic identifications "were not an exploitation of the antecedent illegality, as defendant's photograph was obtained from a source independent of the unlawful arrest, and such identifications proceeded from the witnesses' independent recollections" *(Pleasant* at 974 and n [citation omitted]). Similarly, the DMV records here were obtained by the police from a source independent of the claimed illegal stop.

As the *Farias-Gonzalez* court pointed out, the policy rationale of the exclusionary rule would not be served

by its application to identity-related evidence. The social costs of excluding such evidence are great: courts and the government are entitled to know who defendants are, since permitting defendants to hide their identity would undermine the administration of the criminal justice system and essentially allow suppression of the court's jurisdiction. On the other side of the equation, there are few deterrence benefits. The Constitution does not prohibit the government from requiring a person to identify himself to a police officer. In addition, "even if a defendant in a criminal prosecution successfully suppresses all evidence of his identity and the charges are dropped, the Government can collect new, admissible evidence of identity and reindict him. This is so because identity-related evidence is not unique evidence that, once suppressed, cannot be obtained by other means" (*Farias-Gonzalez*, 556 F3d at 1188-1189 [citation omitted]).

As a result, "[t]he application of the exclusionary rule to identity-related evidence will have a minimal deterrence benefit, as its true effect will often be merely to postpone a criminal prosecution" (*id.* at 1189).

Nor do we believe that "[t]oday's opinion [will] give[ ] law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police" (dissenting op at 390). Police are already deterred from conducting illegal car stops because evidence recovered in the course of an illegal stop remains subject to the exclusionary rule.

Appendix K

While the Supreme Court has held that fingerprint evidence——evidence the dissent describes as "paradigmatic identity evidence" (dissenting op at 389)- may be subject to the exclusionary rule (*Davis v. Mississippi*, 394 US 721, 724 [1969]), *Davis*, as well as *Hayes v. Florida* (470 US 811, 815 [1985]), is distinguishable from this case in two ways. First, the defendants in those cases were illegally stopped for the purpose of obtaining evidence—fingerprints- that would connect the defendants to crimes under investigation. The "identity evidence" was not preexisting. Second, the fingerprints were used, not to establish the identities **5 of the individuals apprehended by the police and subject to the jurisdiction of the court, but to connect those individuals' fingerprints to latent prints recovered from the crime scene. The evidence established defendants' "identities" as the perpetrators, but not their "identities" in the sense relevant here. Our decision today would not alter the outcome of those cases. We merely hold that a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name.

Accordingly, the order of the Appellate Division should be affirmed.

Ciparick, J. (dissenting). Because I believe that Department of Motor Vehicles (DMV) records are subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation, namely an unlawful traffic stop, I respectfully dissent.

Appendix A

The majority has set forth a new rule, that regardless of police conduct, DMV records obtained through a police stop and inquiry of the driver are not subject to the exclusionary rule when the only link between the police conduct and the evidence is that the police learned a defendant's name (*see* majority op at 388). Further, the majority believes that DMV records are not subject to suppression since they are government records compiled independently of defendant's arrest. We disagree on both counts.

It has long been established that evidence derived from a Fourth Amendment violation must be suppressed as "fruit of the poisonous tree" if law enforcement "'exploited or benefited from its illegal conduct' such that 'there is a connection between the violation of a constitutional right and the derivative evidence'" (*People v. Jones*, 2 NY3d 235, 242 [2004] [citations omitted]). We have never before excluded any category of evidence from this rule. Fruit of the poisonous tree may be anything "of evidentiary value" (*Davis v. Mississippi*, 394 US 721, 724 [1969], quoting *Bynum v. United States*, 262 F2d 465, 467 [DC Cir 1958]), including fingerprints (*id.*), photographs (*United States v. Crews*, 445 US 463, 472 [1980]), and identifications (*People v. Gethers*, 86 NY2d 159, 162 [1995]).

The majority relies heavily on a misreading of *INS v. Lopez-Mendoza* (468 US 1032 [1984]). In that case, the United States Supreme Court reviewed two civil deportation proceedings that resulted from illegal police conduct. In the first case, Adan Lopez-Mendoza raised

a jurisdictional issue, that he had been summoned to the deportation proceeding as a result of an unlawful arrest. He did not challenge the admissibility of the evidence proffered against him. In the companion case, Elias Sandoval-Sanchez challenged the introduction of illegally obtained evidence in his deportation proceeding. With respect to Lopez-Mendoza's claim, the Court wrote that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest" (*id.* at 1039). The Fourth, Eighth, and Tenth Circuits read this language as referring only to the court's personal jurisdiction over Lopez-Mendoza, not admissibility of identity evidence (*see United States v. Oscar-Torres*, 507 F3d 224, 227-230 [4th Cir 2007]; *United States v. Olivares-Rangel*, 458 F3d 1104, 1111-1112 [10th Cir 2006]; *United States v. Guevara-Martinez*, 262 F3d 751, 753-755 [8th Cir 2001]). I agree with these courts.

There are several reasons why this reading of *Lopez-Mendoza* is more persuasive than the reading given by the majority. Most importantly, the authority cited for the proposition that a defendant's identity cannot be suppressed refers to an older rule, undisputed here, that the identity of a defendant is never suppressible so as to defeat a court's jurisdiction over that defendant (*Lopez-Mendoza*, 468 US at 1039-1040, citing *Gerstein v. Pugh*, 420 US 103, 119 [1975] and *Frisbie v. Collins*, 342 US 519, 522 [1952]). As such, the *Lopez-Mendoza* language at issue is found in the section of the opinion addressing Lopez-Mendoza's jurisdictional claim. The Court later addressed Sandoval-Sanchez's claim that the

specific identity evidence against him should be suppressed. Rather than applying any "identity rule," as it had when addressing Lopez-Mendoza's jurisdictional claim, the Court held that the exclusionary rule did not extend to deportation proceedings—purely civil proceedings determining a person's eligibility to stay in this country.

I agree with the majority that a defendant's identity cannot be suppressed to defeat the personal jurisdiction of a court. However, identity-related evidence can and should be subject to the exclusionary rule. Indeed, the United States Supreme Court has twice found that fingerprints—paradigmatic identity evidence—are suppressible under the exclusionary rule (*Davis*, 394 US at 724; *Hayes v. Florida*, 470 US 811, 815 [1985]). In *Davis*, the Court held that because "[f]ingerprint evidence is no exception" to the exclusionary rule, defendant's illegally obtained fingerprints that matched the perpetrator's fingerprints on file should have been suppressed (394 US at 724). The Court reaffirmed *Davis* in *Hayes* and found that a defendant's fingerprints taken for an investigative purpose in the course of an unlawful detention were inadmissible fruit of that detention (470 US at 816).

Certainly the deterrent purpose of the exclusionary rule should be applicable to identity-related evidence. The majority's "broad[ ] reading of *Lopez-Mendoza* [gives] the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose [is] limited to establishing a defendant's identity" (*Olivares-*

Rangel, 458 F3d at 1111). Today's opinion gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police. Permitting law enforcement to exploit a Fourth Amendment violation that produces identity or identity-related evidence misses the point; what matters is the legality of the police conduct, not the type of evidence obtained.

Of course, this does not mean that identity-related evidence will necessarily be excluded, even if it is the product of an unlawful stop, but merely that it is subject to the same rules as other evidence. It may indeed be admissible, along with other evidence secured as a result of acquiring defendant's pedigree information, if there is an independent source, discovery was inevitable, or the evidence is attenuated from the illegality (*Gethers*, 86 NY2d at 162). If none of these exceptions apply, the records obtained as a result of identity information acquired during an illegal stop are suppressible. Here, however, because Supreme Court made no determination regarding the legality of the stop, we are in no position to determine whether the proffered evidence should be suppressed.

The majority's second argument-that the DMV records are not subject to the exclusionary rule because they were compiled by a state agency independent of any illegality—ignores that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop. Contrary

to the majority's opinion, our holding in *People v. Pleasant* (54 NY2d 972, 974 [1981]) does not suggest that evidence in possession of a government agency is immune from the exclusionary rule's constraints. In fact, *Pleasant* was entirely premised on the identification at issue being "'sufficiently distinguishable to be purged of the primary taint'" (*id.*, quoting *Wong Sun v. United States*, 371 US 471, 488 [1963] [some internal quotation marks omitted]). In other words, far from holding that identity-related evidence was not subject to suppression, *Pleasant* actually applied the *Wong Sun* analysis and found the evidence at issue to be sufficiently attenuated so as to be admissible. A similar analysis should have been conducted here.

Nor should it matter that the records were public. Defendant here need not establish a legitimate expectation of privacy in the evidence he seeks to suppress, but only that police discovery of the evidence was the product of a Fourth Amendment violation (*see* Kamins, New York Search and Seizure § 1.01 [5] [a], at 1-22 [2009] [compiling lower court decisions that defendant need not have a "reasonable expectation of privacy in the fruit itself"]). Supreme Court below therefore should have considered "whether exploitation of an illegal search and seizure produced the critical link between a defendant's identity and his [government agency] record[s]" (*Olivares-Rangel*, 458 F3d at 1120).

In short, if these DMV records were discovered as a result of an allegedly unlawful stop, they should be subject to suppression as fruit of that illegality. I would

reverse the order of the Appellate Division and remit to Supreme Court for a *Mapp/Dunaway* hearing.

Judges Graffeo, Smith, Pigott and Jones concur with Judge Read; Judge Ciparick dissents and votes to reverse in a separate opinion in which Chief Judge Lippman concurs.

Order affirmed.

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NY, 2010.
PEOPLE v. TOLENTINO
14 N.Y.3d 382

Supreme Court, U.S.
FILED
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No. 09-11556

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF FOR PETITIONER

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645 D

QUESTION PRESENTED

Whether identity-related government records, such as those maintained by the Department of Motor Vehicles, accessed as the direct and immediate result of a Fourth Amendment violation, are subject to the exclusionary rule, and whether the New York Court of Appeals erred by categorically exempting all such fruits from Fourth Amendment suppression irrespective of the nature or magnitude of the underlying police misconduct?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the New York Court of Appeals is published at 14 N.Y.3d 382. J.A. 99a-112a. The opinion of the New York State Supreme Court, Appellate Division, First Department is published at 59 A.D.3d 298. J.A. 96a-98a. The opinion of The New York State Supreme Court, New York County, explaining the summary denial of petitioner's motion to suppress is unpublished. J.A. 79a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on March 30, 2010. The petition for writ of certiorari was filed on June 23, 2010. This Court granted the petition on November 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fourteenth Amendment to the United States Constitution provides, in relevant part: ". . . nor shall any State deprive any person of . . . liberty . . . without due process of law."

Section 511(3)(a)(ii) of the New York Vehicle and Traffic Law, provides: "A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the first degree when such person . . . commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree as defined in subdivision one of this section; and is operating a motor vehicle while such person has in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine, pursuant to subdivision three of section two hundred twenty-six of this chapter or subdivision four-a of section five hundred ten of this article."

Section 511(1)(a) of the New York Vehicle and Traffic Law provides: "A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle is suspended, revoked or otherwise withdrawn by the commissioner."

STATEMENT OF THE CASE

For nearly half a century, this Court has applied the exclusionary rule in state criminal prosecutions where the government seeks to rely on evidence it obtained as a direct result of culpable, unconstitutional law enforcement conduct. In this case, the police stopped petitioner while he was driving and as a result of this stop learned that petitioner was driving with a

suspended license. When the State thereafter charged petitioner with one count of aggravated unlicensed operation of a motor vehicle in the first degree, in violation of New York Vehicle and Traffic Law (V.T.L.) §511(3)(a)(ii), petitioner filed a motion for a *Mapp* hearing, in which he sought to suppress the Department of Motor Vehicle (DMV) records discovered by the police as fruit of the car stop. Although petitioner alleged that the car stop was not supported by reasonable suspicion or probable cause or any other legal justification, the New York County Supreme Court, assuming petitioner's allegations to be true, denied petitioner's motion without an evidentiary hearing, concluding that petitioner did not possess a legitimate expectation of privacy in the DMV records and that such records are not suppressible under a fruit-of-the-poisonous-tree analysis. The New York State Supreme Court, Appellate Division, First Department, agreed with the latter conclusion. A divided New York Court of Appeals affirmed, holding that the exclusionary rule was inapplicable because the DMV records were accessed through reference to petitioner's identity and because they were contained in pre-existing government files. This decision breaks from this Court's longstanding practice of applying the exclusionary rule where the State seeks to rely on evidence it obtained as a direct product of a Fourth Amendment violation.

1. On January 1, 2005, around 7:40 p.m., Police Officer Ronald Marto observed petitioner driving a motor vehicle near the intersection of West 181st Street and Broadway in New York County. J.A. 4a-5a, 8a-9a. After pulling petitioner over and obtaining identifying information from him, the officer performed a DMV database search that revealed that petitioner's license

had been suspended for failure to answer summonses and had not been reinstated. J.A. 5a. He was indicted on one count of aggravated unlicensed operation of a motor vehicle in the first degree, in violation of V.T.L. §511(3)(a)(ii). J.A. 7a.

2. As part of petitioner's omnibus motion in the New York County Supreme Court, he moved to suppress his DMV records; alternatively, he asked the Supreme Court to hold a *Mapp* hearing. J.A. 17a-18a. Petitioner alleged that the car and petitioner were "seized when the police stopped the car." J.A. 28a. Petitioner asserted that he "was operating the motor vehicle in accordance with all posted traffic laws," that he had not "commit[ted] any traffic infraction that would have given the police cause to stop his vehicle," and that the car stop was unsupported by "reasonable suspicion, probable cause, or any other legal justification." J.A. 26a-27a.

In even more detail, petitioner alleged that:

> [o]n the day of the defendant's warrantless seizure and arrest by the police and on the day of the alleged incident, he had not been engaged in any unlawful or suspicious conduct. He had not been driving in an erratic, dangerous or otherwise unlawful manner, nor was there anything illegal about the condition of his automobile. Additionally defendant was not playing his radio at an unlawfully high volume. Moreover, any contrary information was not communicated to the police by a reliable source with personal knowledge. The defendant specifically challenges the

> reliability and basis of knowledge of any informant who may have transmitted information to the police.

J.A. 35a.

The motion further argued that petitioner's DMV records were the suppressible fruit of a Fourth Amendment violation because they were only accessible as a result of petitioner's unlawful seizure. J.A. 27a-29a. The motion explained that a vehicle must be stopped and the driver's name or license number must be obtained before DMV driving records can be generated. J.A. 32a-33a. The motion reasoned that "[a]lthough the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest," the records are nonetheless subject to suppression because the police were only able to discover these records "as a direct result of the defendant's illegal street stop and subsequent arrest." J.A. 32a.

The prosecution opposed petitioner's suppression motion on the ground that "even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule" because they "were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested." J.A. 70a, 72a.[1]

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1. The prosecution also opposed the motion on the ground that the stop was supported by probable cause. J.A. 69a-70a.

On July 12, 2005, the New York County Supreme Court denied petitioner's request for suppression of the DMV records and for a *Mapp* hearing. The court held that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis" (emphasis in original). J.A. 79a. On August 3, 2005, petitioner pleaded guilty to the sole count in the indictment, J.A. 90a-91a; on September 28, 2005, the Supreme Court sentenced him to five years of probation and a $500 fine. J.A. 94a-95a.

3. Petitioner appealed from the judgment of conviction, and in his appeal, argued that the motion court had erred in summarily denying his suppression motion. On February 24, 2009, the New York State Supreme Court, Appellate Division, First Department affirmed the judgment. J.A. 96a-98a. The appellate court disagreed with the suppression judge's conclusion concerning standing, holding that a defendant need not establish a privacy interest in "an alleged fruit of a preexisting violation of his or her Fourth Amendment rights." J.A. 97a. Nonetheless, the court concluded that DMV records were not "suppressible fruits" because they were akin to petitioner's identity, which it concluded was not suppressible. J.A. 97a. The court also held that the records were not suppressible because they "were compiled independently" of petitioner's arrest. J.A. 97a.

4. On March 30, 2010, the New York State Court of Appeals, by a vote of five-to-two, affirmed the Appellate

Division decision, holding that suppression of evidence was unavailable "when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." J.A. 106a.

The majority premised its decision on language in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984), that "the 'body' or identity of a defendant . . . in a criminal . . . proceeding is never itself suppressible as a fruit of an unlawful arrest," which it interpreted as creating a categorical exception to the exclusionary rule for all identity-related evidence. The majority concluded that "[a] contrary holding would 'permit[] a defendant to hide who he is [and] would undermine the administration of the criminal justice system.'" J.A. 101a-102a (citing *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1187 (11th Cir. 2009)) (internal quotation marks omitted). The court examined federal circuit court decisions interpreting *Lopez-Mendoza* and holding that pre-existing government immigration files are not subject to suppression. The court approved the reasoning underlying those decisions that "there is no sanction . . . when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence. (citing *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) (citation and internal quotation marks omitted)." J.A. 103a. Then, it compared the discovery of alien records at issue in the circuit court cases with the discovery of petitioner's DMV records and concluded that "[t]he facts [were] analogous." J.A. 103a.

Although the majority made clear that this did not form "an independent basis" for its decision, it

interpreted language from *United States v. Crews*, 445 U.S. 463, 475-77 and 475 n. 22 (1980) (plurality) ("[t]he exclusionary rule . . . does not reach backward to taint information that was in official hands prior to any illegality") to further justify its decision eliminating the exclusionary rule sanction for petitioner, since DMV records are "public records already in the possession of authorities." J.A. 103a.

The court opined that applying the exclusionary rule in cases involving identity-related evidence would engender "great" social costs, "since permitting defendants to hide their identity would undermine the administration of the criminal justice system and essentially allow suppression of the court's jurisdiction," whereas it would generate only "few deterrence benefits" since "identity-related evidence is not unique evidence" so that the "true effect" of application of the rule would be "merely to postpone a criminal prosecution," J.A. 105a (citing *Farias-Gonzalez*, 556 F.3d at 1189), and since "[other] evidence recovered in the course of an illegal stop remains subject to the exclusionary rule." J.A. 105a.

Finally, the court attempted to harmonize its decision with this Court's decisions in *Davis v. Mississippi*, 394 U.S. 721, 724 (1969) and *Hayes v. Florida*, 470 U.S. 811, 815 (1985), which had authorized the suppression of fingerprint identity evidence. To do this, the New York court distinguished the defendants in *Davis* and *Hayes* from petitioner on two grounds: first, the defendants in *Davis* and *Hayes* were stopped so that police could obtain evidence that was not pre-existing (fingerprints), and second, the fingerprint evidence was being used to

"establish[] defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here." J.A. 106a. Because of these supposed differences, the New York court concluded that its decision was in harmony with *Davis* and *Hayes* and would not "alter the outcome" of those cases. J.A. 106a.

The dissent rejected the majority's main argument, concluding that it "relie[d] heavily on a misreading of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)." J.A. 107a. The majority decision, it concluded, failed to recognize that the language from *Lopez-Mendoza* that "[t]he 'body' or identity of a defendant" was never "suppressible as a fruit of an unlawful arrest" referred only to the court's power to assert jurisdiction over an individual and not to the admissibility of identity-related evidence at a proceeding conducted pursuant to that jurisdiction. J.A. 108a. The dissent had no quarrel with the majority's conclusion that a defendant's identity cannot be suppressed to defeat the jurisdiction of the court. The dissent, however, emphasized that there was a clear difference between identity for jurisdictional purposes and identity-related evidence that, the dissent maintained, was subject to suppression. J.A. 109a.

The dissent concluded that there was no justification for creating an exception to the exclusionary rule for DMV records obtained by the police through exploitation of an unlawful traffic stop. The majority was, in effect, excluding a specific category of evidence from the exclusionary rule's ambit, something that the court had never done before. J.A. 107a. As demonstrated by this Court's decisions in *Davis* and *Hayes*, however, where fingerprints — "paradigmatic identity evidence"

— were found suppressible, "[f]ruit of the poisonous tree may be anything 'of evidentiary value.'" J.A. 107a, 109a. Accordingly, "identity-related evidence can and should be subject to the exclusionary rule." J.A. 109a. The dissent noted that the Fourth, Eighth and Tenth Circuits shared its view, J.A. 108a, citing *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); and *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001).

The dissent maintained that the deterrent purpose of the exclusionary rule applied to identity-related evidence, and that "the legality of the police conduct" should be the focus of the inquiry, "not the type of evidence obtained." J.A. 110a. Creating an exception to the exclusionary rule for driving records would, the dissent cautioned, encourage Fourth Amendment violations because it "gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police." J.A. 110a.

The dissent also rejected the conclusion that DMV records are not subject to suppression because they are government records compiled independently of a defendant's arrest. This argument was flawed because it "ignore[d] that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop." J.A. 110a.

SUMMARY OF ARGUMENT

Shortly after 7:30 p.m. on January 1, 2005, the police stopped petitioner while he was driving, learned his identity during the stop, used his identity to gain access to his DMV records, and discovered that he was driving with a suspended license. When petitioner moved to suppress the DMV records, he alleged that the police seized him without any trace of justification — a random, baseless stop long disapproved by this Court. *See Delaware v. Prouse*, 440 U.S. 648 (1979). The New York Court of Appeals assumed petitioner's allegations to be true but concluded that, irrespective of the nature or magnitude of the underlying police misconduct in a particular case, DMV records were categorically immune from suppression as the fruit of the poisonous tree because of the identity-related nature of those records. But a random, baseless stop is the paradigm of deliberate unconstitutional police conduct that the exclusionary rule was designed to deter, and the New York Court of Appeals' categorical exemption of DMV records from the exclusionary rule would invite bold disregard for the Constitution.

1. The primary purpose of the exclusionary rule is to discourage unconstitutional police conduct. *See, e.g., Davis v. Mississippi*, 394 U.S. 721, 724 (1969) ("[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment"). It remains the "general rule in a criminal proceeding that . . . evidence obtained as a result of an unlawful warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v.*

Lopez-Mendoza, 468 U.S. 1032, 1040-1041 (1984). Honoring that general rule, this Court has held that nearly every type of evidence is subject to suppression as the fruit of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the police illegality. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citation omitted). Moreover, although a defendant must demonstrate a sufficient privacy interest to challenge an unlawful search or seizure, a defendant need not establish any expectation of privacy regarding the evidence to be suppressed as a fruit of the illegality. *See id.* at 484, 486-88.

This Court has never exempted identity-related evidence from the exclusionary rule. What this Court has held is that the exclusionary rule cannot be used to deprive courts of jurisdiction by allowing a criminal defendant himself to become a suppressible "fruit." *See INS v. Lopez-Mendoza*, 468 U.S. 1032; *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). In petitioner's case, the New York Court of Appeals relied heavily on *Lopez-Mendoza* to justify its conclusion that the exclusionary rule does not apply to identity-related evidence. But the jurisdictional doctrine at issue in *Lopez-Mendoza* simply supports the proposition that the exclusionary rule is limited to evidentiary matters and is consistent with this Court's suppression of prototypical identity-related evidence. *See Davis v. Mississippi*, 394 U.S. at 723-34 (suppressing fingerprints as fruit of Fourth Amendment violation) and *United States v. Crews*, 445 U.S. 463 (1980) (approving the suppression of photographs and pre-trial identifications as fruit of Fourth Amendment violation).

This Court long ago recognized the impropriety of suspicionless stops designed to ascertain an individual's identity, *see Brown v. Texas*, 443 U.S. 47 (1979), and has specifically applied this rule to car stops. *Delaware v. Prouse*, 440 U.S. 648. But the New York Court of Appeals' systematic exemption of identity-related records from the exclusionary rule would eliminate deterrence when it is most needed and would strongly encourage the police to violate the very principles at issue in *Brown* and *Prouse*.

II. The independent source doctrine, originally articulated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), establishes that if the police gain knowledge of or access to evidence independently of an illegal search or seizure, the exclusionary rule does not prohibit its introduction at a criminal trial. Its purpose is to ensure that the police are "put[] . . . in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred." *Murray v. United States*, 487 U.S. 533, 537 (1988)(citation omitted) (emphasis in original).

Here, the independent source doctrine does not operate, since the police did not ascertain that petitioner's license had been suspended by means independent of the unlawful seizure. They discovered that information only by capitalizing on their unlawful detention of petitioner to learn his identity as the driver of the car. Without the knowledge directly gained from the illegal stop, the police had no reason to examine petitioner's DMV records. The suppression of the DMV records will not put the police in a worse position than they would have been in absent the illegality. The police

would simply be unable to use the evidence they discovered as a direct and immediate result of their illegal conduct. The operation of the exclusionary rule would not bar the State from prosecuting petitioner for unlicensed driving on the occasion at issue if they obtained evidence of his unlicensed driving independent of the unlawful stop.

The New York Court of Appeals' reliance on *United States v. Crews*, 445 U.S. 463, to support its conclusion that the DMV records here were independently obtained and thus not subject to the exclusionary rule does not withstand scrutiny.

In *Crews*, the authorities possessed evidence connecting the defendant to the crime before the illegal seizure even occurred. In contrast, the police accessed petitioner's DMV records as a direct result of the illegal stop, and those records had absolutely no evidentiary significance until and apart from that stop. Hence, the mere fact that the State DMV database had contained those records provides no justification for immunizing the Fourth Amendment violation that gave the information inculpatory value.

III. This Court applies the exclusionary rule "where its deterrence benefits outweigh its 'substantial social costs'". *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). To be applicable the rule must "'result in appreciable deterrence.'" *Leon*, 468 U.S. at 905-906 (citation omitted).

If police could conduct arbitrary, suspicionless car stops to ascertain an individual's identity – the conduct expressly condemned in *Prouse* – they would have a strong incentive to do so. The temptation to circumvent the protections of the Fourth Amendment is precisely the same powerful incentive the police have to discover evidence of criminality in the classic exclusionary rule scenario. *See Hudson v. Michigan*, 547 U.S. 586, 596 (2006) ("The value of deterrence depends upon the strength of the incentive to commit the forbidden act.").

As a close analog to deterrence, this Court focuses on the culpability of the police actions that are potentially subject to the exclusionary rule. *Herring v. United States*, 129 S. Ct. 695, 701 (2009). "The extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Id.*

Because the New York Court of Appeals categorically concluded that the DMV records could never be the fruit of the poisonous tree, the records would not be suppressible under the New York rule regardless of the flagrancy of the police misconduct. Thus, under the approach of the New York Court of Appeals, the DMV records would not be suppressible even in the face of deliberate and/or systemic violations of the Fourth Amendment.

The cost of applying the exclusionary rule in any case is substantial. *Lopez-Mendoza*, 468 U.S. at 1041; *see Herring*, 129 S. Ct. at 701. Nonetheless, the general rule in a criminal case is that, absent attenuation, evidence obtained as a result of an unlawful search or

seizure is suppressible. Accordingly, in weighing the costs of applying the rule against the benefits in particular situations, the Court has focused on costs beyond those typically associated with the operation of the rule. *See, e.g., Hudson*, 547 U.S. at 595.

Application of the exclusionary rule to the DMV records in petitioner's case implicates only ordinary costs, endemic to the rule's operation. Petitioner's case involves a traditional single-act offense in which the rule would not function to insulate future misconduct. Further, application of the exclusionary rule here would not lead to unfamiliar suppression litigation and would not create new dangers to officers in the field. *See Hudson*, 547 U.S. at 595-596. Finally, the State would still possess an array of alternative methods to enforce the traffic laws against unlicensed drivers. *See Prouse*, 440 U.S. at 659-63.

Under these circumstances, because the benefits outweigh the costs, application of the exclusionary rule is required.

ARGUMENT

I. WHEN THE POLICE, ABSENT REASONABLE SUSPICION OR PROBABLE CAUSE, STOP AN INDIVIDUAL AND ACQUIRE IDENTITY-RELATED EVIDENCE, THE TRADITIONAL REMEDY OF EXCLUSION APPLIES TO THAT EVIDENCE.

The police pulled over petitioner's car in a traffic encounter that the New York courts presumed, in resolving his suppression claim, was supported by neither the requisite reasonable suspicion nor probable cause and could, in fact, have been entirely random or even invidious. The officers then obtained identifying information from petitioner and, immediately thereafter, checked the computer records of the DMV, which led to their discovery that his license had been suspended. Following petitioner's arrest and indictment, a state trial court justice denied his motion to suppress without a hearing, concluding that, even if the stop violated petitioner's Fourth Amendment rights, the exclusionary rule did not apply to such identity-related fruits as petitioner's DMV records. This determination, eventually upheld by a divided New York Court of Appeals, misconstrues this Court's Fourth Amendment jurisprudence. An examination of the relevant authority demonstrates that there is no reason why the exclusionary rule should not apply to the direct products of an unlawful traffic stop.

There is no legitimate argument here that the discovery of the suspension was attenuated from the stop, or that the data in the DMV computer network

revealing the suspension would have been otherwise accessed or had any evidentiary value without the police ascertainment of petitioner's identity as a direct result of the stop. The deterrence value of the exclusionary rule in this context is therefore particularly strong: this Court's recognition of the impropriety of suspicionless traffic stops explicitly seeks to deter police from detaining motorists for the purpose of obtaining their licenses or other identifying information, precisely the intrusion at issue here. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). Accordingly, assuming the illegality of the stop as the New York courts did, petitioner should be entitled to suppression of the direct fruit of that unlawful seizure: the information in DMV files that his license had been suspended.

A. Under the Fourth Amendment, a Police Officer who Lacks Reasonable Suspicion or Probable Cause May Not Stop an Individual to Obtain Identity-Related Information.

This Court long ago recognized that suspicionless stops by law enforcement to obtain identity-related evidence violate the Fourth Amendment. In *Delaware v. Prouse*, 440 U.S. 648, the State, citing its strong interest in ensuring public safety on the roads, urged this Court to approve discretionary automobile stops, in the absence of any suspicion, for the purpose of determining whether the driver possessed a valid license. *Id.* at 658. The Court flatly declined the invitation, holding that such stops violate the Fourth Amendment unless the police have "reasonable suspicion that a motorist is unlicensed or that an

automobile is not registered." *Id.* at 663. In so holding, this Court reasoned that "[t]o insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . .'" *Id.* at 661 (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.*

A similar analysis animated the Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), where Texas sought to prosecute Brown for violating a provision of the state penal code that made it a crime for individuals to refuse to identify themselves when stopped by the police. *Id.* at 48-49. The arresting officer acknowledged that he stopped Brown "to ascertain his identity." *Id.* at 52. Although Brown refused to provide it, the Court, finding that the police lacked reasonable suspicion for the stop, unanimously concluded that his prosecution was constitutionally infirm: "even assuming that [crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Id.*; *cf. Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 188 (2004) ("A state law requiring a suspect to disclose his name *in the course of a valid Terry stop* is consistent with the Fourth

Amendment prohibitions against unreasonable searches and seizures.") (emphasis added).[2]

Given the Court's recognition in *Prouse* and *Brown* that suspicionless intrusions to acquire identity-related evidence offend the Fourth Amendment, it would be anomalous indeed to conclude that these very fruits could form the basis of a criminal prosecution against petitioner irrespective of the legality of the automobile stop that led directly to their discovery. But there is no such anomaly: a review of this Court's precedents demonstrates that the exclusionary rule fully applies to these evidentiary fruits.

B. Exclusion Remains the Appropriate Remedy for Evidence Obtained as the Direct Result of an Illegal Intrusion.

It remains the "general rule in a criminal proceeding that statements and other evidence obtained as a result of an unlawful warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040-41 (1984); *see Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (stating that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt"). Exclusion of such

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2. As these decisions establish, the New York Court of Appeals erred when it declared categorically that "[t]he Constitution does not prohibit the government from requiring a person to identify himself to a police officer." J.A. at 105a. Absent reasonable suspicion, such conduct is unconstitutional.

evidence is necessary to vindicate citizens' core constitutional entitlement "to shield 'their persons, houses, papers and effects,' U.S. Const. Amdt. 4, from the government's scrutiny." *Id.* at 593. The exclusionary rule remains the mechanism for enforcing these rights "where its remedial objectives are thought most efficaciously served, — that is, where its deterrence benefits outweigh its substantial social costs." *Id.* at 591 (internal citation omitted).

Although all types of evidence are subject to the exclusionary rule, there is a rational limit to the scope of the rule's application. Thus, in *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963), this Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police" (emphasis added). Because the exclusionary rule was created to deter the government from performing illegal actions, where there was only an "attenuated connection" between the Fourth Amendment violation and derivative evidence, this Court concluded that the deterrent effect would be negligible and suppression was not warranted. *Id.* Short of that, however, the salutary remedial objectives of the rule are achieved by its application.

In *Hudson*, this Court highlighted the distinction between "cases excluding the fruits of unlawful warrantless searches," *id.* at 593, where constitutional violations can "produc[e] incriminating evidence that could not otherwise be obtained," *id.* at 596, from violations of the knock-and-announce rule, where the probable cause warrant requirement has been met, fully entitling the police to search the premises. Because the

interests violated through noncompliance with the knock-and-announce rule ("protection of human life and limb," *id.* at 594; "protection of property," *id.*; and protection of "those elements of privacy and dignity that can be destroyed by a sudden entrance," *id.*) "have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Id.*; *see also id.* at 603 ("Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.") (Kennedy, J., concurring in part and concurring in judgment). By contrast, this Court has recognized that if the interests violated bear "a sufficiently close relationship to the underlying illegality," even "the indirect fruits of an illegal search or arrest should be suppressed." *New York v. Harris*, 495 U.S. 14, 19 (1990).

This Court has held that nearly every category of evidence is subject to suppression as "fruits" or "derivative evidence" of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the initial police illegality. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Wong Sun*, 371 U.S. at 488; *see, e.g., Sibron v. State of New York*, 392 U.S. 40 (1968) ("fruits" held to include tangible evidence); *Davis v. Mississippi*, 394 U.S. 721, 723-724 (1969) ("fruits" held to include anything of "evidentiary value," specifically evidence of defendant's fingerprints); *United States v. Giordano*, 416 U.S. 505 (1974) ("fruits" held to include words overheard); *Dunaway v. New York*, 442 U.S. 200, 217-19 (1979) ("fruits" held to include statements and confessions); *United States v. Crews*, 445 U.S. 463, 472,

473 n. 18 (1980) ("fruits" held to include photographic and corporeal pre-trial identifications and, in appropriate circumstances, in-court identification testimony).

Moreover, although a defendant must demonstrate a sufficient privacy interest to establish the Fourth Amendment violation itself, *see Rakas v. Illinois*, 439 U.S. 128, 140-141 (1978), no such expectation of privacy need be shown regarding the evidence to be suppressed as a fruit of the primary illegality. Thus, in *Wong Sun*, in adjudicating the case of defendant James Wah Toy, the Court suppressed drugs found at a codefendant's house, in which Toy plainly had no expectation of privacy, as the fruit of Toy's unlawful arrest. 371 U.S. at 484, 486-88. Consistent with the result in *Wong Sun*, there is a consensus among federal circuit courts that the exclusionary rule applies to fruit without regard to whether the defendant has a reasonable expectation of privacy in that fruit. *See United States v. Torres-Ramos*, 536 F.3d 542 (6th Cir. 2008); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1117-19 (10th Cir. 2006); *United States v. Mosley*, 454 F.3d 249, 253 (3rd Cir. 2006); *United States v. Chanthasouxat*, 342 F.3d 1271, 1281 (11th Cir. 2003); *United States v. Ameling*, 328 F.3d 443, 446 n. 3 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095-1096 (9th Cir. 2000); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998); *United States v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980); *but cf. United States v. Bowley*, 435 F.3d 426, 430-431 (3rd Cir. 2006); *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943-944 (5th Cir. 1978). *See also* 6 W. LaFave, Search & Seizure §11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007), *cited favorably in Brendlin v. California*, 551 U.S. 249, 259 (2007).

C. Identity-Related Evidence is not Exempted from the Exclusion Remedy.

The New York Court of Appeals would categorically remove all identity-related evidence from the ambit of the exclusionary rule. However, this Court has never exempted such evidence from the exclusionary rule, and there is no justification to do so now.

In *Davis*, 394 U.S. 721, the police, while investigating a rape, arrested Davis without probable cause and obtained his fingerprints, which matched those left at the crime scene and which served as critical evidence against him at trial. *Id.* at 722-723. Citing the nature of fingerprints, the State, and Justice Stewart in his dissenting opinion, urged the Court to create an exception to the exclusionary rule for identification evidence of this variety. *Id.* at 726 and 730. In Justice Stewart's view, fingerprints were "not 'evidence' in the conventional sense that weapons or stolen goods might be." *Id.* at 730. Rather, "[l]ike the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingerprints can be exactly and endlessly reproduced." *Id.*

The Court, however, emphatically declined to create an exception to the exclusionary rule. *See id.* at 724 ("Fingerprint evidence is no exception to this comprehensive rule."). To the contrary, it held that fingerprints obtained as a product of an unlawful detention were subject to the exclusionary rule:

> True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from

> a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.

Id. at 724, adopting *Bynum v. United States*, 262 F.2d 465, 467 (D.C. Cir. 1958). *See also Hayes v. Florida*, 470 U.S. 811 (1985) (reaffirming *Davis* and reiterating that fingerprint evidence remains subject to the exclusionary rule).

In Crews, 445 U.S. 463, the Court again recognized the applicability of the exclusionary rule to identification-related evidence. Specifically, the Court agreed that photographic and lineup identifications obtained as a direct result of defendant's unlawful arrest were suppressible fruits. *Id.* at 472. In addition, a witness's in-court identification of a defendant is subject to suppression if sufficiently tainted by the original illegality. *Id.* at 472-473, 473 n. 18, 473 n. 19. And, in *United States v. Ceccolini*, 435 U.S. 268 (1978), though the Court rejected the defendant's argument that the testimony of a live witness who had observed the defendant should be suppressed in that case as the product of an unlawful police search of physical evidence, it also rejected the Government's argument for a *per se* prohibition against the suppression of witness testimony, recognizing that if the connection between the illegality and the witness's testimony had been sufficiently close, suppression would be warranted. *Id.* at 273-79.

Of course, this Court has long held that the exclusionary rule cannot be used to defeat the jurisdiction of the courts by allowing a criminal defendant himself to become a suppressible "fruit." *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032. A contrary rule would immunize the defendant from prosecution, a remedy going well beyond the interests that the exclusionary rule seeks to protect. *See Crews*, 445 U.S. at 474 ("[R]espondent . . . cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."). However, as the foregoing discussion indicates, this jurisdictional rule is distinct from whether identity-related evidence is suppressible, and indeed has not prevented the Court from recognizing the applicability of the exclusionary rule to other identity-related evidence – evidence comparable to the DMV records at issue here.

In petitioner's case, the New York state courts relied heavily on this Court's decision in *Lopez-Mendoza* to justify their conclusion that the exclusionary rule does not apply to identity-related evidence – a conclusion not only at odds with the case law discussed above at pp. 24-26 – but also with *Lopez-Mendoza* itself. The *Lopez-Mendoza* decision resolved the cases of two respondents in separate civil deportation proceedings. Both respondents contended that their arrests had violated the Fourth Amendment, but the respondent in the first proceeding, Lopez-Mendoza, did not seek the

suppression of any evidence. *Lopez-Mendoza*, 468 U.S. at 1035. Rather, based on the purportedly illegal arrest, he contended solely that the proceedings against him had to be terminated. *Id.* It was in response to this claim that the Court, citing the *Ker-Frisbie* rule, noted that "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Id.* at 1039-1040 (citations omitted). Because Lopez-Mendoza had "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest" and because "he entered no objection to the evidence offered against him," rejection of his claim was required. *Id.* at 1040.

Viewed in this context, it is clear that the New York courts erred when they relied on this Court's language in *Lopez-Mendoza* to reject petitioner's suppression-of-evidence claim. First, this Court's citations in the relevant portion of *Lopez-Mendoza* to *Gerstein v. Pugh*, 420 U.S. at 119; *Frisbie v. Collins*, 342 U.S. 519, 522 and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923), plainly responded only to Lopez-Mendoza's jurisdictional argument. The Court then removed any doubt on this issue when it stated that the other *Lopez-Mendoza* respondent, Sandoval-Sanchez, who "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding," 478 U.S. at 1041,[3] had "a more substantial claim" than the purely jurisdictional one raised by

3. Sandoval-Sanchez's claim was that statements and other evidence offered against him at the immigration hearing should have been suppressed as the product of his unlawful, warrantless arrest. *Id.* at 1040.

Lopez-Mendoza, *Id.* at 1040. Indeed, Sandoval-Sanchez lost only because the Court held that the exclusionary rule did not apply to his civil proceeding. *Id.* at 1040-51.

Thus, as the dissenters below recognized, *Lopez-Mendoza*, far from prohibiting the application of the exclusionary rule to all identity-related evidence in criminal proceedings, supports the proposition that the rule applies to such evidence. *Accord United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 753, 755 (8th Cir. 2001).[4]

D. The DMV Records at Issue are Subject to Exclusion Because they are Directly Related to the Claimed Fourth Amendment Violation.

As a consequence of the stop of his vehicle, the police obtained identifying information from petitioner. They immediately exploited that information to acquire the data in DMV files that his license was suspended. Applying the well-settled principles governing the suppression of unlawfully obtained evidentiary fruits, *Wong Sun*, 371 U.S. 471, there is no question that, "granting establishment of the primary illegality," the evidence at issue here was "come at by exploitation of that illegality," rather than "by means sufficiently

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4. Those Circuit Courts that have interpreted *Lopez-Mendoza* more broadly, *see, e.g., United States v. Bowley*, 435 F.3d 426, 430 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999), have erred in precisely the same way as the New York Court of Appeals majority here.

distinguishable to be purged of the primary taint." *Id.* at 488 (citation omitted). Accordingly, the DMV records are subject to suppression and the New York courts should have so found.

Moreover, the degree of connection between the underlying purpose of the rule that is violated and the evidence acquired as a result has a critical bearing on whether attenuation is present, since the deterrence value served by the exclusionary rule is strongest when that relationship is closest. *Compare Hudson*, 547 U.S. at 593 ("[a]ttenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained) *with Harris*, 495 U.S. at 19 (even "the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality").

Here, unlike in *Hudson*, the police exploited the illegal stop to gather the very information (identifying information about the status of the driver) that the governing rule in *Prouse* was intended to prohibit; this immediately led to their acquisition of knowledge that petitioner's license was suspended. That information is, accordingly, the suppressible fruit of his unlawful seizure. To hold otherwise would create an incentive for the police to violate the Fourth Amendment by conducting illegal suspicionless car stops, which would be tantamount to sanctioning the random spot checks for license and registration that *Prouse* prohibited. Thus, the remedial objective of deterrence would be well-served by applying the exclusionary rule here.

II. BECAUSE THE POLICE GAINED ACCESS TO PETITIONER'S DMV FILES AS THE DIRECT RESULT OF THEIR ILLEGAL SEIZURE OF PETITIONER, THE "INDEPENDENT SOURCE" DOCTRINE PRESENTS NO LEGITIMATE OBSTACLE TO SUPPRESSION.

It is well-settled that if law enforcement authorities gain knowledge of or access to evidence independently of an illegal search or seizure, the exclusionary rule does not bar its introduction. That doctrine (called "independent source") is inapplicable here. The police gained knowledge of petitioner's status as an unlicensed driver entirely as a result of their illegal seizure of petitioner. The bare existence of that data in DMV computer files had no evidentiary significance absent petitioner's identity as the driver, which was ascertained as a direct result of the Fourth Amendment violation, was entirely unknown to the police who seized petitioner, and would have remained unknown absent the illegal stop. Accordingly, the information was not possessed by law enforcement in any meaningful sense until the police unearthed it as a result of their unlawful conduct, and, for that reason, the independent source doctrine does not apply.

The doctrine was originally articulated by Justice Holmes, writing for the Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. There, the authorities had seized documentary evidence in violation of the Fourth Amendment. *Id.* at 390. After the trial court ordered the evidence returned, the prosecution tried to reacquire it by subpoena. *Id.* at 391. Concluding that

the issuance of the subpoena did not eliminate the Fourth Amendment violation, the Court declared:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id. at 392.

The independent source doctrine applies when the police "learn[] of" the evidence by means independent of the Fourth Amendment violation. *Wong Sun*, 371 U.S. at 487. Its purpose is to ensure that the police are "put[] . . . in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Murray v. United States*, 487 U.S. 533, 537 (1988) (*quoting from Nix v. Williams*, 467 U.S. 431, 443 (1984)) (emphasis in original).

The Court's decisions in *Segura v. United States*, 468 U.S. 796 (1984), and *Murray* illustrate that if evidence is acquired in a manner that is truly

independent of the police illegality it is not subject to suppression. In *Segura*, the police illegally entered an apartment without a warrant and secured the premises. However, they did not search the apartment at that juncture and observed no evidence. Instead, they obtained and later executed a search warrant that was based on information "known to the agents well before the illegal entry" and obtained "from sources wholly unconnected with the entry." *Id.* at 814. Since the warrant was untainted by any illegally acquired information, its execution provided a lawful and independent basis for the acquisition of the evidence that it authorized the police to seize.

The Court invoked the independent source doctrine again in *Murray*, in which the facts were similar to *Segura* except that the police had observed some of the evidence as a result of their illegal entry. The Court rejected the petitioner's contention that the discovery of the evidence before the execution of the warrant made the independent source doctrine inapplicable, assuming that, as in *Segura*, the warrant provided an independent, untainted basis for the search. Importantly, the Court noted that the search pursuant to the warrant would not be "a genuinely independent source" of the evidence at issue, "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. at 542. Thus, it remanded the case to the District Court for resolution of these questions.

Applying these principles here, it is obvious that the independent source doctrine does not govern, since the police did not discover that petitioner's license had been suspended by means independent of the unlawful seizure, such as the untainted warrants authorizing the searches in *Segura* and *Murray*. Instead, the police unearthed that information only by capitalizing on petitioner's unlawful detention. Without that tainted information, the police had no reason to examine the status of petitioner's license.

The New York Court of Appeals' reliance on *Crews*, 445 U.S. 463, to support its conclusion that the DMV records were "public records already in the possession of the authorities," and hence independently obtained, J.A. at 103a, cannot withstand scrutiny.[5] In *Crews*, the police took defendant into custody without probable cause, but before that illegal detention, they "both knew his identity and had some basis to suspect his involvement in the very crimes with which he was charged." *Id.* at 475.[6] After they took his photograph, they released him, and the victim made a photographic identification of him, leading the police to detain him again; the victim then identified him at a lineup and at trial. *Id.* at 466-468. The Court recognized that the victim's photographic and lineup identifications were

5. The Court of Appeals' majority itself acknowledged that the "independent source" portion of its opinion did not alone justify the result, J.A. at 103a, which was based primarily on its view that identity-derived evidence was not subject to the exclusionary rule. J.A. at 101a-103a.

6. They learned this information as a result of a tentative identification by a witness and through brief, noncustodial questioning of petitioner. *Id.*

suppressible fruits of the defendant's initial, unlawful arrest, but held her courtroom identification admissible since it was based on the "mental image of her assailant" formed at the time the crime was committed and was uninfluenced by the inadmissible pre-trial identifications. *Id.* at 472-473, 473 n. 18.

Based on these facts, a plurality[7] of the Court concluded, in language cited by the Court of Appeals in petitioner's case:

> [T]he Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp. Rather, respondent's unlawful arrest served merely to link together two extant ingredients in his identification. The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.

Id. at 475.

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7. Two concurring Justices in *Crews* (Justice Powell, joined by Justice Blackmun), who otherwise joined Justice Brennan's opinion for the Court, declined to embrace the portion of Justice Brennan's opinion containing this language, but only because they believed that a defendant can never be immunized from prosecution under Fourth Amendment analysis, a question that they believed Justice Brennan had left open. 445 U.S. at 477. Three other Justices (Justice White, joined by Chief Justice Burger and Justice Rehnquist) agreed with Justices Powell and Blackmun, but would have gone farther, concluding that an in-court identification can never be considered a suppressible fruit of an unlawful arrest. 445 U.S. at 477-79 and fn.*

The admissibility of in-court identification testimony such as that in *Crews* is not at issue here, and we have already established that identity-related evidence, such as the fingerprints at issue in *Davis v. Mississippi* and *Hayes v. Florida* and the out-of-court identifications suppressed in *Crews* itself, is subject to the exclusionary rule. *See, ante*, at pp. 24-26. Unlike a crime victim's independently-derived mental image of a perpetrator, the susceptibility to the exclusionary rule of information that is obtained as a direct result of an unlawful detention is not debatable. Here, only by illegally detaining petitioner did the police ascertain his identity, and then they exploited that knowledge to uncover his unlicensed status. The independent source doctrine operates only to allow the introduction of evidence that is discovered through lawful means.

Moreover, unlike in *Crews*, we do not seek to exclude evidence "that was in official hands prior to any illegality." The information in petitioner's DMV file that petitioner did not have a valid driver's license was not "in official hands" in any meaningful sense. There was no investigation into petitioner's driving records before the police stopped his vehicle. Those records, by themselves, had no evidentiary value. They attained significance only after the police learned, by exploiting their unlawful stop, that petitioner was driving the car. Hence, it was not derived from a source independent of the Fourth Amendment violation; indeed, its discovery was made possible by the violation. *See Olivares-Rangel*, 458 F.3d at 1120. Whereas in *Crews*, "the toxin . . . was injected only after the evidentiary bud had blossomed," 445 U.S. at 471, in this case the toxin injected by the unlawful stop *enabled* the evidentiary bud to "blossom,"

rendering the independent source doctrine inapplicable and requiring the suppression of the DMV file information as poisoned fruit.

Finally, the suppression of the DMV file information will not "put the police in a worse position than they would have been in absent any error or violation." *Murray*, 487 U.S. at 537. The police would simply be unable to use the evidence they discovered by their illegal conduct. The operation of the exclusionary rule would not bar the police from prosecuting petitioner for unlicensed driving on the occasion at issue if they obtained evidence that he was driving without a license through means independent of the unlawful stop. Moreover, if the police stopped petitioner legally on another occasion, they could legitimately gain access to the DMV database, and if his license had not been reinstated, they could use that information to prosecute him for unlicensed driving.

For all of these reasons, the application of the exclusionary rule to the police acquisition of petitioner's DMV file information cannot legitimately be defeated by operation of the independent source doctrine.

III. BECAUSE A RANDOM, BASELESS CAR STOP IS THE TYPE OF DELIBERATE POLICE MISCONDUCT THAT THE EXCLUSIONARY RULE DETERS MOST EFFECTIVELY AND BECAUSE THE SOCIAL COSTS OF APPLYING THE EXCLUSIONARY RULE TO THE DMV RECORDS IN PETITIONER'S CASE DO NOT DIFFER FROM THOSE ARISING FROM THE RULE'S GENERAL APPLICATION IN CRIMINAL CASES, EXCLUSION IS THE APPROPRIATE REMEDY HERE.

Although the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10 (1995), this Court's decisions "establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial." *Herring v. United States*, 129 S. Ct. 695, 699 (2009). "[T]he continued operation of the exclusionary rule, as settled and defined by [this Court's] precedents, is not in doubt." *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in judgment).

Nonetheless, application of the exclusionary rule "is not an automatic consequence of a Fourth Amendment violation." *Herring*, 129 S. Ct. at 698. Rather, "the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* "To trigger the exclusionary rule, the police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. "The pertinent analysis of deterrence and

culpability is objective, not an 'inquiry into the subjective awareness of arresting officers.'" *Id.* at 703 (citations omitted).

When police conduct is sufficiently deliberate that exclusion can meaningfully deter it, the Court balances the deterrent effect against the negative consequences that result from application of the rule. Thus, this Court applies the rule "'where its remedial objectives are thought most efficaciously served,'" *Hudson*, 547 U.S. at 591 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)) – that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

A. Suppressing the Introduction of DMV Records Accessed as the Result of Illegal Automobile Stops would, as in Analogous Situations where the Exclusionary Rule is Routinely Applied, Meaningfully Deter the Police from Intruding on a Driver's Clearly Protected Fourth Amendment Interests.

The deterrent effect of the exclusionary rule is at the heart of the balancing test that determines the scope of the rule's application. Indeed, because the exclusionary rule is not an individual right, but a remedy directed at broader societal enforcement of constitutional protections, it applies only where it "'result[s] in appreciable deterrence.'" *Leon*, 468 U.S. at 905-906 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). When this Court has declined to extend the

reach of the exclusionary rule, central to its determination has been the conclusion that the proposed expansion of the rule would less effectively deter Fourth Amendment violations than in situations where the exclusionary rule has traditionally applied. *See Herring*, 129 S. Ct. at 700 ("we have focused on the efficacy of the rule in deterring Fourth Amendment violations"). Thus, it must be clear that the proposed application will have a significant effect in deterring the type of Fourth Amendment violation involved. *See Evans*, 514 U.S. at 15 (in declining to apply exclusionary rule to police officials who reasonably relied on mistaken information in court's database, the Court deemed "most important [that] there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors).

In the paradigmatic exclusionary rule situation – suppressing physical evidence discovered incident to a warrantless arrest lacking probable cause, *see, e.g.*, *Wong Sun*, 371 U.S. at 484-88 – the remedy of exclusion nullifies a strong incentive on the part of police. One of a police officer's primary responsibilities is to discover evidence of criminality that can be used to prosecute those who break the law. If unconstitutional seizures and searches could lead directly to admissible evidence, the police would have a powerful incentive to engage in this illegal conduct. *See Hudson*, 547 U.S. at 596 ("the value of deterrence depends upon the strength of the incentive to commit the forbidden act").

Here, the deterrent effect is at the same high level as in the traditional exclusionary rule situation. The

police have a strong interest in promoting safety on the roadways, and to accomplish that goal, the police have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse*, 440 U.S. at 658. If police could arbitrarily stop an automobile operating on a roadway and detain the driver to check the status of his or her license, they would have a strong incentive to do so. In those cases where the police discovered the driver to be unlicensed, they would accomplish the twin goals of removing an unqualified motorist from the roadways and of producing evidence of criminality that could be used to prosecute the motorist. This strong incentive to circumvent the protections of the Fourth Amendment is the same as the incentive the police have to discover evidence of criminality in the typical exclusionary rule scenario.

Indeed, were the exclusionary rule not applied here, the police would have a strong incentive to engage in the practice squarely condemned by this Court in *Prouse* as violative of the Fourth Amendment – the arbitrary, suspicionless stop of a motorist to check license and registration. 440 U.S. at 659. With this incentive unchecked, the police would be substantially undeterred from the wholesale evasion of the protections announced in *Prouse*. Meaningful enforcement of *Prouse* is all the more important in light of this Court's recognition in *Whren v. United States*, 517 U.S. 806 (1996), that the objective standard of probable cause protects motorists from unwarranted police violations of the Fourth Amendment, rather than an evaluation of the subjective motivations of the police officers conducting the automobile stop. The application of the exclusionary rule to DMV records accessed as a result of an illegal car

stop would provide the most efficacious method of enforcing these fundamental objective constitutional protections.

B. Arbitrary, Suspicionless Car Stops are the Type of Flagrant Police Misconduct that Merit Application of the Exclusionary Rule.

As a companion to deterrence, this Court focuses on the culpability of the police actions that are potentially subject to the exclusionary rule. *Herring*, 129 S. Ct. at 701. "The extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Id.*; *see also Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) ("[T]he deterrent value of the exclusionary rule is most likely to be effective" when "official conduct was flagrantly abusive of Fourth Amendment rights."). As the Court stated in *Leon*, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. 468 U.S. at 911.

This Court's emphasis on the presence or absence of flagrant police misconduct has emerged over the course of several decisions in which the Court declined to extend the reach of the exclusionary remedy. In *Leon*, the Court held that the exclusionary rule did not apply if the police acted in "objectively reasonable reliance" on a judicially authorized search warrant that was subsequently invalidated. 468 U.S. at 922. Shortly thereafter, the Court elected not to apply the exclusionary rule to warrantless administrative searches performed in good-faith reliance on a statute

later declared unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 349-350 (1987). Then, in *Evans*, the Court applied the "good-faith" rationale to police who reasonably relied on information in a court's database that mistakenly indicated that an arrest warrant was outstanding. 514 U.S. 1. Most recently, in *Herring*, this Court cited the absence of deliberate misconduct as "crucial to [its] holding" declining to apply the exclusionary rule where an officer reasonably believed, based on existing departmental records, that there was an outstanding arrest warrant, but that belief turned out to be mistaken because of a negligent bookkeeping error by another police employee. 129 S. Ct. at 700.

The unifying theme behind these cases is that police conduct that is not objectively culpable, but rather arises from good-faith reliance on existing records or on judicial or legislative authorization later found infirm, does not warrant application of the exclusionary rule. *Herring* ultimately rests explicitly on the important distinction between the isolated instance of negligent record keeping at issue there and "deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence," to which the exclusionary rule appropriately applies. 129 S. Ct. at 702. In distinguishing between the merely negligent conduct before it and the more culpable scenarios to which the exclusionary rule rightly applies, the Court, in *Herring*, pointed to the classic examples of *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961). In both *Weeks* and *Mapp*, the police who interacted with the defendants acted not in good-faith reliance on prior authorizations, but in direct violation of the protections of the Fourth Amendment.

This Court concluded that an error like the one in *Herring* that arises from nonrecurring and attenuated negligence is far removed from the "core concerns" that led the Court to adopt the rule in cases like *Weeks* and *Mapp*. 129 S. Ct. at 702.

Here, petitioner's motion to suppress in New York County Supreme Court alleged that the police, without justification, stopped petitioner while he was driving his car, ordered him to turn over his driver's license, and then conducted a computer check of petitioner's DMV records. In response, the State never suggested that the police officers involved had had prior dealings with petitioner or, in sharp contrast to their counterparts in *Leon*, *Evans* or *Herring*, had acted in good-faith reliance on a warrant or other existing records in making the stop in the first place. The motion court denied petitioner's motion without holding a hearing to assess the veracity of petitioner's allegations, concluding that the DMV records could never constitute evidence subject to suppression under a fruit-of-the-poisonous-tree analysis. Thus, in deciding petitioner's motion to suppress, the motion court assumed petitioner's allegations to be true. And the New York State appellate courts similarly assumed petitioner's allegations to be true for the purpose of resolving the suppression issue. Indeed, because the New York State courts concluded that the DMV records could never be the fruit of the poisonous tree, the records would not be suppressible under the New York rule regardless of the flagrancy of the police misconduct.

Petitioner's allegations describe police conduct that is within the "core concerns" that led this Court to adopt

the exclusionary rule. *Herring*, 129 S. Ct. at 702. The unjustified stop of a vehicle for the purpose of checking a motorist's license is exactly the scenario held to violate the Fourth Amendment in *Prouse*. Thus, as in both *Weeks* and *Mapp*, unlike the good-faith reliance cases that culminated with *Herring*, the police conduct at issue here constituted the type of constitutional violation to which the exclusionary rule paradigmatically applies. And importantly, under the approach of the New York state courts, the DMV records would not be suppressible even in the face of avowedly deliberate, systemic violations of the applicable Fourth Amendment protections.

C. The Privacy Interests Implicated by Arbitrary, Suspicionless Car Stops are Substantial.

The magnitude of the privacy interest violated by police misconduct is also relevant to the overall balancing of the consequences of applying the exclusionary rule. As this Court discussed in *Prouse*, individuals have a strong privacy interest when driving their cars:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves to pedestrian or other modes of travel. Were the individual subject to

> unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

440 U.S. at 662-663.

When the police engage in an arbitrary, suspicionless car stop, they engage in a significant intrusion on that privacy interest. Random unjustified seizures visit a "physical and psychological intrusion" upon the occupants of a vehicle. *Prouse*, 440 U.S. at 657. These stops have the potential to "create substantial anxiety" and "interfere with freedom of movement." *Id.*

D. The Social Costs of Applying the Exclusionary Rule to the DMV Records in Petitioner's Case Do Not Differ From Those Arising From the Rule's General Application in Criminal Cases.

To justify application of the exclusionary rule, "the benefits of deterrence must outweigh the costs." *Herring*, 129 S. Ct. at 700 (citation omitted). The cost of applying the rule in any case is substantial: "there is the loss of often probative evidence and all of the secondary costs that flow from less accurate or more cumbersome adjudication." *Lopez-Mendoza*, 468 U.S. at 1041; *see Herring*, 129 S. Ct. at 701. Nonetheless, the "general rule in a criminal case is that . . . evidence obtained as a result of an unlawful warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *Lopez-Mendoza*, 468 U.S. at 1040-1041. Accordingly, in

weighing the costs of applying the rule against the benefits in particular situations, the Court has focused on costs beyond those endemic to the operation of the rule itself. *See Lopez-Mendoza*, 468 U.S. at 1046 (declining to apply rule in circumstances where its costs were "unusual and significant"); *Hudson*, 547 U.S. at 595 (same, where the rule's contemplated application would have resulted in "considerable" costs *"[i]n addition* to the grave adverse consequences that the exclusion of relevant incriminating evidence always entails") (emphasis added).

Application of the exclusionary rule to the DMV records in petitioner's case implicates no social costs beyond those that inevitably ensue whenever the rule operates. First, unlike in *Lopez-Mendoza*, where the Court refused to apply the rule to "continuing violations of the law," 547 U.S. at 1046, petitioner's case involves a traditional single-act offense in which the rule would not function to insulate future misconduct. Second, in contrast to the violations of the knock-and-announce rule at issue in *Hudson*, application of the exclusionary rule here would not engender suppression litigation unfamiliar to the New York courts and would neither create additional dangers to officers in the field nor foster the destruction of evidence. *Hudson*, 547 U.S. at 595-596. Finally, suppression of the DMV records in cases like petitioner's would not unduly hamstring the State, which would retain an array of alternative weapons in its efforts to enforce the traffic laws against unlicensed drivers. *Prouse*, 440 U.S. at 659-63. For all of these reasons, application of the exclusionary rule is appropriate.

1. Aggravated Unlicensed Operation of a Motor Vehicle, the Offense With Which Petitioner was Charged, is Not a Continuing Crime.

In *Lopez-Mendoza*, the Court declined to extend the exclusionary rule to deportation proceedings 468 U.S. at 1042. In addition to identifying the differences between these civil matters and traditional criminal prosecutions, the Court, in weighing the social costs of applying the rule, noted that the respondent there was "a person whose unregistered presence in this country, without more, constitutes a crime." *Id.* at 1043-45, 1047. Because his "release within our borders would immediately subject him to criminal penalties," the exclusionary rule's application in that case engendered costs "unique to continuing violations of the law." *Id.* at 1046-1047. Specifically, applying the exclusionary rule to continuing offenses "would require courts to close their eyes to ongoing violations of the law." *Id.* at 1046. Noting that it "had never before accepted costs of this character" as the price of an exclusionary remedy, the Court concluded that the "constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue the crime." *Id.* at 1047.

These costs are not implicated in petitioner's case because the offense of which he was accused – first-degree aggravated unlicensed operation of a motor vehicle, *see* N.Y. Vehicle & Traffic Law §511 (3)(a)(ii) – is a single act, rather than a continuing offense. Specifically, petitioner did not commit the offense at issue merely because he was a person whose driver's license

had been suspended. Rather, it was only petitioner's single act of driving a car at 7:40 p.m. on January 1, 2005, that triggered liability under Vehicle & Traffic Law §511 (3)(a)(ii). Beyond that single act, his continuing status as a person with a suspended driver's license did not constitute the charged offense.

For that reason, application of the exclusionary rule to the DMV records in petitioner's case would be no different from application of the rule to contraband or evidence in any other prosecution for a single-act offense. Specifically, under petitioner's theory, if he established the illegality of the traffic stop at a suppression hearing, the State would, at most,[8] be precluded from introducing his DMV records to establish his unlawful operation of his vehicle at the time that the police stopped him on January 1, 2005. If the police lawfully stopped petitioner while he was driving on a subsequent occasion (and petitioner's license remained suspended), there would be absolutely no impediment to the introduction of his DMV records to establish his unlawful operation of the vehicle at that time.

Thus, affording petitioner an exclusionary remedy here would in no way "require courts to close their eyes to ongoing violations of the law." *Lopez-Mendoza*, 468 U.S. at 1046. To the contrary, like offenders who escape

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8. If, at the suppression hearing, the State presented evidence independent of that derived from the unlawful stop establishing that petitioner was driving on the occasion in question, then there would be no Fourth Amendment violation and the DMV records would be admissible. *See, ante*, at p. 36.

liability for ordinary possessory crimes because courts suppress the weapons or the narcotics that police unlawfully recover from them, petitioner would be fully subject to prosecution should he be stopped again for driving with a suspended license. Assuming the legality of that stop, his DMV records could serve as the centerpiece of the case against him. Hence, unlike in *Lopez-Mendoza* or other cases involving continuing crimes, the cost of a blunder by the constable in situations like petitioner's is one for which an exclusionary remedy has long been tolerated.

2. The Suppression Issues Presented in Petitioner's Case are Identical to those Routinely Resolved by Courts on a Daily Basis.

In *Hudson*, the Court weighed the social costs of an exclusionary remedy to redress police violations of the Fourth Amendment knock-and-announce rule and determined that those costs were too high. *Hudson*, 547 U.S. at 594-99. First among the cited costs, the Court noted that a newly crafted suppression remedy "would generate a constant flood of alleged failures to observe the rule," causing courts "to experience as never before the reality" that suppression litigation can be complex and time consuming. *Id.* at 595. Moreover, unlike traditional suppression claims in which the existence of a violation can be easily ascertained, purported departures from the knock-and-announce rule "would be difficult for a trial court to determine and even more difficult for an appellate court to review." *Id.* This potential explosion of unfamiliar suppression litigation was a significant factor underlying *Hudson*'s refusal to

apply the exclusionary rule. *See also Lopez-Mendoza*, 468 U.S. at 1048 (citing, in support of its refusal to extend the exclusionary rule to civil deportation proceedings, the facts that "neither the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law" and that "invocation of the exclusionary rule might significantly change and complicate the character of these proceedings").

No such costs would ensue if the exclusionary rule were applied to petitioner's case. Hearing and appellate courts in criminal cases in all jurisdictions already routinely examine suppression claims hinging on whether the police have stopped a vehicle in violation of the Fourth Amendment. Prosecutors and defense attorneys litigate such claims with great frequency day in and day out. Moreover, unlike the murky knock-and-announce claims described in *Hudson*, 547 U.S. at 595, automobile-stop cases do not, as a rule, present issues of particular complexity.

Specifically, an officer's stop of an automobile is reasonable so long as the police have probable cause to believe that a traffic violation has occurred or reasonable suspicion to believe that an occupant has engaged in unlawful activity. *Whren*, 517 U.S. at 810; *see Prouse*, 440 U.S. at 661, 663. The inquiry is a narrow, straightforward and objective one: difficult-to-resolve issues such as "the actual motivations of the individual officers involved" or whether a "reasonable officer in the same circumstances would have made the stop" play no role in the determination of "constitutional reasonableness." *Id.* at 813-814. Accordingly, application

of the exclusionary rule to DMV records in cases such as petitioner's would require only that courts resolve issues that they already adjudicate in brief and straightforward proceedings on a daily basis.

3. Application of the Exclusionary Rule to Cases Like Petitioner's Would Neither Create Additional Dangers for Law Enforcement Personnel Nor Foster the Destruction of Evidence.

In declining to extend the exclusionary rule to Fourth Amendment knock-and-announce violations, the *Hudson* Court concluded that the impact of a newly created suppression remedy "would be officers' refraining from timely entry after knocking and announcing." *Hudson*, 547 U.S. at 595. Such hesitation, the natural product of law enforcement efforts to conform to an expansion of the exclusionary rule, could yield "preventable violence against officers in some cases, and the destruction of evidence in many others." *Id.* (citation omitted). Such costs weighed heavily against application of the exclusionary rule in *Hudson*.

No such deleterious consequences would result if the exclusionary rule were applied to petitioner's DMV records. The Fourth Amendment inquiry in petitioner's case would be exactly the same as in all other automobile stop cases: whether the authorities had probable cause or reasonable suspicion to pull over the vehicle. *Whren*, 517 U.S. at 810; *Prouse*, 440 U.S. at 661, 663. Law enforcement officers in New York are well familiar with these requirements as they already apply full force to car stop suppression hearings involving other

evidentiary fruits. While the refusal to apply the exclusionary rule here might well encourage officers to risk suspicionless, warrantless license checks in violation of *Prouse*, 440 U.S. at 663, *see, ante*, at p. 40, application of the rule will impose no Fourth Amendment constraints on police conduct beyond those already mandated under existing jurisprudence. Accordingly, in sharp contrast to *Hudson*, a suppression remedy for petitioner will pose no increased risk to officer safety or to the integrity of evidence.

E. As the *Prouse* Court Recognized, Because the Authorities Have Many Tools at their Disposal to Crack Down on Unlicensed Drivers, There is No Reason to Forgo the Traditional Exclusionary Remedy When a Police Stop Violates the Fourth Amendment.

"The States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse*, 440 U.S. at 658. This Court decided long ago, however, that there are many options besides suspicionless stops to vindicate this important interest, *Prouse*, 440 U.S. at 656-657, 659-61, and that, "[g]iven the alternative mechanisms available, both those in use and those that might be adopted," there was insufficient justification for exempting road stops such as the one in petitioner's case from Fourth Amendment review. *Id.* at 659.

In *Prouse*, for example, the Court expressly recognized the continued viability of roadside weigh stations and inspection checkpoints. *Id.* at 663, n.26. Such permanent checkpoints can play a significant role

in locating drivers operating without proper credentials. In addition, the *Prouse* Court noted with approval the use of other fixed checkpoints designed by law enforcement for specific purposes. *Id.* at 656-57. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 546 (1976) (upholding checkpoint inquiring as to motorists' immigration status). In the years following *Prouse*, the Court has upheld other similar law enforcement techniques. *See Illinois v. Lidster*, 540 U.S. 419, 427-428 (2004) (upholding checkpoint directed at obtaining information regarding a recent area hit-and-run accident); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 448 (1990) (upholding sobriety checkpoints aimed at promoting safety on roadways). These tactics as well serve as valuable tools for detecting unlicensed drivers. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 39 (2000) (noting *Prouse*'s suggestion that "a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible").

Finally, *Prouse* recognized that the "foremost method of enforcing traffic and vehicle safety regulations" is "acting upon observed violations." *Prouse*, 440 U.S. at 659. Traffic stops such as these, the Court noted, "occur countless times each day" and, during such encounters, "licenses and registration papers are subject to inspection and drivers without them will be ascertained." *Id.* Indeed, because "drivers without licenses are presumably less safe drivers whose propensities may well exhibit themselves," relying on observed traffic violations to root them out is both effective and efficient. *Id.*

In petitioner's case, the State asserted that an observed traffic violation led to the discovery that petitioner's license had been suspended. Petitioner denied committing any traffic violation, and, in resolving the case, the New York courts accepted that denial as true. The rule adopted by the Court of Appeals majority, however, entirely exempts the State in this and all similar cases from the requirement that it establish the existence of a violation justifying the car stop. As *Prouse* also recognizes and as subsequent decisions confirm, there exists an array of viable law enforcement alternatives to suspicionless license checks. For this reason as well, there is no justification for New York's refusal to apply the exclusionary rule to the stop in petitioner's case.

* * *

A random, baseless car stop is the paradigmatic type of deliberate police misconduct that the exclusionary rule was designed to deter. And petitioner's DMV records were "come at by exploitation" of the claimed illegality. *Wong Sun*, 371 U.S. 471. This Court's precedents demonstrate that the identity-related nature of those records do not put them beyond the reach of the exclusionary rule. Carving out an identity-derived records exception to the exclusionary rule would create unwise incentives for police and invite disregard for the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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No. 09-11556

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

REPLY BRIEF

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REPLY BRIEF

1. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT THE EXCLUSIONARY RULE DOES NOT APPLY TO ANY INFORMATION "OBTAINED" OR "ACQUIRED" BY THE STATE PRIOR TO AN UNLAWFUL ARREST, EVEN WHEN THAT INFORMATION BECOMES KNOWN TO LAW ENFORCEMENT ONLY AS A RESULT OF AN UNLAWFUL SEIZURE.

Respondent argues that the exclusionary rule should not apply to DMV records discovered by police as the direct result of an unlawful seizure. The "independent source" doctrine precludes suppression, respondent claims, solely because the computer data containing the information that a driver's license has been suspended is available to law enforcement, even when the police have no knowledge of its existence until their unlawful stop. (RB-13-27). This argument is inconsistent with decisional law and with common sense. The purpose of the independent source rule is to guarantee that evidence that has been acquired independently of an illegal search or seizure will not be excluded, because its exclusion would, without justification, put the prosecution in a worse position than it would have been in if no misconduct had occurred. *Murray v. United States*, 487 U.S. 533, 537 (1988). In this case, if the police had not unlawfully stopped his vehicle at 7:40 p.m. on January 1, 2005, they would have been entirely unaware that the driver, petitioner, had no valid license. Depriving them of the fruits of that misconduct would place them in the same, not a worse, position, and, since there is no other justification for declining to apply the exclusionary rule, the records should be subject to suppression.

Wrenching language out of context from exclusionary rule cases, and relying on dictionary definitions, respondent urges that the rule applies only to evidence "acquired" or "obtained" independently. Something that is "already in one's possession" cannot be "obtained" or "acquired," respondent asserts; "evidence that is in government hands *before* purportedly illegal police behavior cannot logically be considered to have been obtained by that *later* -in-time illegality." (RB-14-15). This Court, however, has squarely contradicted respondent's semantic viewpoint. In *Murray*, the Court rejected the defendant's view that the doctrine applies only to "evidence *obtained for the first time* during an independent lawful search." 487 U.S. at 537. Instead, it accepted the government's argument that the doctrine legitimized the seizure of evidence "*later* obtained independently" as the result of untainted police conduct. *Id.* Thus, for purposes of this doctrine, the same evidence can be "obtained" twice.

Going beyond semantics, the Court, in discussing the applicability of the independent-source rule, has consistently described the pertinent issue not as whether law enforcement theoretically had access to the evidence independent of any illegality, but whether it had legitimately acquired *actual knowledge* of its existence and value. *See Murray*, 487 U.S. at 541 ("*Knowledge that the marijuana was in the warehouse* was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant") (emphasis supplied); *Segura v. United States*, 468 U.S. 796, 814 (1984) (rule applied where police executed a search warrant based on information "*known to the agents* well before the illegal entry") (emphasis added); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (doctrine

applies if government *"learned of"* the evidence from an independent source) (emphasis supplied). And, in the first case to recognize the doctrine, the Court described it as applying "[i]f *knowledge of* [facts obtained illegally] is gained from an independent source" (emphasis added). *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The Court's focus on police awareness, rather than unknowing acquisition, of evidence is supported by sound policy. More is needed to foreclose the salutary operation of the exclusionary rule than that the government happens to have unknowing dominion over evidence. A rule effectively enforcing Fourth Amendment rights needs to operate when police learn of the existence of evidence and ascertain its value through exploitation of an illegal search or seizure. Respondent's position would deny exclusionary rule protection simply because government files, unknown to the police prior to the illegality, were later discovered to contain useful evidence -- only by capitalizing on that illegality.

For the same reasons, respondent's reliance on *United States v. Crews*, 445 U.S. 463 (1980), *Maryland v. Macon*, 472 U.S. 463 (1985), and *Segura* is misguided. In *Crews*, the Court permitted the introduction of the victim's in-court identification notwithstanding the defendant's unlawful arrest, because that identification was the product of an independent source: the victim had conveyed her independent memory of the robber's appearance to police, and the police "both knew [Crews'] identity and had some basis to suspect his involvement in the very crimes with which he was charged." *Crews*, 445 U.S. at 475. Similarly, in *Macon*, the police legally obtained

possession of obscene magazines by purchasing them before their unlawful arrest of the bookstore clerk. And in *Segura*, the police executed a search warrant based on information "*known to the agents* well before the illegal entry," obtained from "sources wholly unconnected with the entry." 468 U.S. at 814. Here, in contrast, it was their presumptively unlawful acquisition of DMV records that informed the police about petitioner's driving record; police had no knowledge of or information about this before petitioner's arrest. Moreover, the DMV records had no evidentiary significance independent of police knowledge of the driver's identity – information obtained directly as a result of the illegality.

It is also difficult to defend the notion that the police, or, more broadly, law enforcement, already "possessed" the information contained in DMV files even in the most literal linguistic sense. Notably, respondent does not claim otherwise; it asserts that the records were "compiled and maintained by the state, and in the lawful possession of the government," and are "freely available" to police (RB-15). But neither respondent nor the United States (see *amicus* brief for United States at 20-21) claim that DMV is a branch of law enforcement, nor could they. In the context of the applicability of a statute requiring prosecutorial disclosure of witness statements that are in the possession of law enforcement agencies, the New York Court of Appeals has held that statements in the custody of DMV do not qualify because DMV is an administrative, rather than law enforcement, entity. *See People v. Washington*, 86 N.Y.2d 189, 192 (1993); *People v. Flynn*, 79 N.Y.2d 879, 892 (1992). Moreover, the Driver's Privacy Protection Act of 1994, although it permits the dissemination to a "law enforcement agency" of personal driving-record

information in the records of state departments of motor vehicles, clearly treats such departments as independent of law enforcement. *See* 18 U.S.C. §2721.

The United States insists that such a distinction is inconsequential (*amicus* brief for United States at 21), but it is wrong. In the scenario presented here, since DMV, the custodian of these records, is not a branch of law enforcement, law enforcement obtained this information, even in a technical sense, only by exploiting the unlawful vehicle stop. Thus, the entire premise underlying the independent source doctrine -- that law enforcement acquired the evidence independent of the unlawful search or seizure -- does not apply.[1]

Respondent also argues that because these records are already in "the government's" possession, petitioner has no legitimate "privacy or possessory interest of any kind" in their remaining unknown to police, and hence could not reasonably expect that his license suspensions would not be discovered by the authorities (RB-17-18). This contention is irrelevant. Respondent earlier conceded that, as petitioner argued in his opening brief (PB-23), a defendant challenging an unlawful search or seizure need not demonstrate a reasonable expectation of privacy in the fruits of that Fourth Amendment violation to justify suppression (RB-17-18). Respondent's subsequent contention merely represents an effort to

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1. The United States argues that litigating whether the custodial agency is part of law enforcement would create "difficult line-drawing problems," positing as an example whether the database is a "joint NYPD-DMV project." (*amicus* brief for United States at 21). But there is no reason to believe that establishing such a link, if one exists, would be anything other than routine.

resurrect an argument that respondent had previously, and appropriately, jettisoned.

Pointing out that an officer's independent knowledge of a suspect's license suspension would preclude suppression, respondent further asserts that a suppression hearing in this situation would lead to "time-consuming, fact-intensive litigation into the mind of police officers." (RB-23). That is demonstrably false. If the prosecution wishes to argue that the arresting officer knew of the status of a driver's DMV records independently of his/her unlawful acquisition of the computer data, all it would have to do is ask the officer that question. If the prosecution does not ask, or if the officer responds negatively, the court would have no basis to conclude that the state had met its burden of establishing an independent source.[2] Unlike the scenario presented in *Whren v. United States*, 517 U.S. 806 (1996), cited by respondent (RB-18), the court need not perform the difficult task of ascertaining the motivation of the arresting officer, merely whether the officer knew or did not know about the driver's suspensions.

Finally, respondent analogizes this case to *New York v. Harris*, 495 U.S. 14 (1990), in which the Court held that when police, in violation of *Payton v. New York*, 445 U.S. 573 (1980), enter a suspect's home to arrest him without a

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2. Courts have uniformly recognized that if the defendant demonstrates an unlawful search or seizure, the prosecution has the burden to establish an independent source. *E.g., United States v. Siciliano*, 578 F.3d 61, 68 (1st Cir. 2009); *United States v. Forbes*, 528 F.3d 1273, 1279 (10th Cir. 2008); *United States v. Leake*, 96 F.3d 409, 417 (6th Cir. 1996); *State v. Cardenas*, 155 P.3d 704, 709-710 (Idaho 2006); *State v. Johnson*, 73 P.3d 282, 287-288 (Ore. 2003); *see Murray*, 487 U.S. at 539-540.

warrant, evidence obtained outside the home is not subject to suppression. But *Harris* is a classic case in which the fruits sought to be suppressed bore no relationship to the purpose underlying the Fourth Amendment rule at issue -- to protect the physical integrity of the home. In stark contrast, the rule recognized in *Delaware v. Prouse*, 440 U.S. 648 (1979), prohibiting suspicionless vehicle stops to acquire identifying information about the driver, aims to prevent police from stopping individuals to obtain precisely the sort of evidence that we seek to suppress here. *Harris* itself recognizes that if the interest violated bears "a sufficiently close relationship to the underlying illegality," even "the indirect fruits of an illegal search or arrest should be suppressed." 495 U.S. at 19.

II. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO ERECT AN ACROSS-THE-BOARD EXCEPTION TO THE FRUIT-OF-THE-POISONOUS-TREE DOCTRINE FOR CASES LIKE PETITIONER'S IN WHICH IDENTITY-RELATED EVIDENCE, INCLUDING A SUSPECT'S NAME, OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, LEADS DIRECTLY TO OTHER EVIDENTIARY FRUITS, SUCH AS THE DMV RECORDS AT ISSUE HERE.

Respondent takes no issue with the bedrock propositions that the exclusionary rule extends "to indirect as [well as] direct products" of Fourth Amendment violations, *Wong Sun*, 371 U.S. at 484, and that excludible Fourth Amendment fruits can encompass anything of "evidentiary value" in a particular case. *Davis v. Mississippi*, 394 U.S. 721, 724 (1969). Respondent also plainly recognizes the

evidentiary value of the DMV records in its prosecution of petitioner (RB-19) ("evidentiary significance . . . inherent in the records themselves"). Nonetheless, respondent would have this Court draw the brightest of lines, prohibiting application of the fruit-of-the-poisonous-tree doctrine to the DMV records in petitioner's case and to evidentiary fruits generally "where the sole link between the disputed evidence and the Fourth Amendment violation is that the police learned the suspect's name in the course of the unlawful act" (RB-28). Respondent's argument fails, both as a factual matter here and because it finds no support in this Court's Fourth Amendment jurisprudence.

Preliminarily, respondent is mistaken when it contends that the "sole link" (RB-28) between the Fourth Amendment violation and the DMV records was the police acquisition of petitioner's name. In fact, as respondent's own Voluntary Disclosure Form makes clear, the police, in addition to eliciting petitioner's name, also elicited, in the immediate wake of the automobile stop, his statement that he did not possess a New York driver's license. J.A.-8a. That statement plainly fell within the exclusionary rule's ambit; respondent cannot credibly contend otherwise. As much as the acquisition of petitioner's name, this statement may have prompted the authorities to run the DMV check and discover the DMV records. Thus, the entire factual premise of respondent's argument collapses.

Even if the police had elicited only petitioner's name before running the DMV check, respondent's argument would miss the mark. Contrary to respondent's claim, evidence that police elicited petitioner's name as the driver of the vehicle at the time of the unlawful stop would itself be subject to suppression as a fruit under

the exclusionary rule. This Court has defined a Fourth Amendment fruit as "something of evidentiary value which the public authorities have caused an arrested person to yield to them during an illegal detention." *Davis*, 394 U.S. at 724. Plainly, evidence that police elicited petitioner's name from him in the immediate aftermath of the unlawful car stop meets this definition and, thus, should be subject to the exclusionary rule. Respondent's concern notwithstanding, this conclusion would not have "the practical effect of immunizing the defendant from prosecution" in contravention of the *Ker-Frisbie* doctrine (RB-29). If the police had other evidence, obtained independently of the Fourth Amendment violation, that petitioner was driving on the occasion in question, then the State could prosecute him, adduce that proof at trial and introduce the DMV records, which would now derive from an independent source. Only evidence that police acquired petitioner's name at the time of the unlawful stop would fall to the exclusionary rule and, for that reason, *Ker-Frisbie* concerns simply do not arise. To be sure, in particular cases, suppression of unlawfully obtained identity-related evidence may make prosecution difficult or impossible, but that is a "contemplated cost" of the exclusionary rule and "not the result of a complete bar to prosecution." *Crews*, 445 U.S. at 474 n. 20.

Moreover, even if the acquisition of petitioner's name during the unlawful traffic stop somehow fell outside the exclusionary rule's ambit, respondent would not benefit because this police conduct nevertheless violated the Fourth Amendment. *See United States v. Leon*, 468 U.S. 897, 906 (1984) (recognizing that questions regarding the applicability of the exclusionary sanction are distinct from questions of whether the Fourth Amendment has been

violated). In *Prouse*, 440 U.S. at 663, this Court held that suspicionless automobile stops to ascertain the validity of a motorist's license violated the Fourth Amendment. Similarly, in *Brown v. Texas*, 443 U.S. 47, 52 (1979), this Court held that a stop "to ascertain [an individual's] identity" "without any specific basis for believing he is involved in criminal activity" transgressed Fourth Amendment guarantees. *Id.*

Respondent relies on this Court's discussion in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 185-86, 191 (2004), about the crucial role of a suspect's name in administering the justice system (RB-32-33). Critically, however, respondent fails to acknowledge *Hiibel*'s holding that a state law requiring a suspect to disclose his name passes Fourth Amendment muster if it occurs "in the course of a valid *Terry* stop . . . ." *Id.* at 188. Under *Hiibel*, as under *Prouse* and *Brown*, police violate the Fourth Amendment when they acquire identification-related information during an unlawful government intrusion.

Because the police acquisition of petitioner's name plainly transgressed Fourth Amendment requirements, respondent's plea for a blanket exception to the fruit-of-the-poisonous-tree doctrine falls flat. Even if the evidence that the police elicited petitioner's name were subject to an exclusionary rule exemption, that evidence was still obtained unlawfully, in violation of the Fourth Amendment. Accordingly, evidence flowing directly from it, such as the DMV records, would nonetheless be suppressible as fruit. *Wong Sun*, 371 U.S. at 487-88 (given the existence of a Fourth Amendment illegality, fruit-of-the-poisonous-tree doctrine extends to all evidence "come at by exploitation of that illegality").

Respondent cites this Court's statement in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984), that the "'body' or identity of a defendant" "is never itself suppressible as a fruit of an unlawful arrest. . . ." (RB-30). Respondent acknowledges, however, that Lopez-Mendoza did not seek suppression of evidence, only dismissal of proceedings against him because of his unlawful arrest, and that the Court made the above-quoted statement in disposing of this claim (RB-30). *Lopez-Mendoza*, 468 U.S. at 1040. That, along with the Court's citation to, *inter alia*, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), and *Frisbie v. Collins*, 342 U.S. 519, 522 (1952), establish that the Court intended only to restate the familiar *Ker-Frisbie* principle that the exclusionary rule may not be invoked to defeat a court's jurisdiction. That principle does not assist respondent, as petitioner seeks only to suppress specific evidence, the DMV records, not to defeat the court's jurisdiction to prosecute him entirely.

Respondent notes that the Court reiterated this principle in the case of Sandoval-Sanchez, Lopez-Mendoza's co-respondent, who had, in fact, moved to suppress evidence at his deportation hearing (RB-30-31). Specifically, the Court explained that, in a civil deportation proceeding, the government need only establish a person's "identity and alienage" and "[s]ince the person and identity of the respondent are not themselves suppressible, the INS must prove only alienage. . . ." *Lopez-Mendoza*, 468 U.S. at 1043. Respondent suggests that this pronouncement broadly establishes a rule that identity-related evidence is never subject to suppression "no matter what the context," (RB-31), but respondent goes too far. In fact, the Court's statement, which expressly cites back to its earlier iteration of the rule in resolving Lopez-Mendoza's case,

does no more than restate the *Ker-Frisbie* maxim that an individual may not deploy the fact of an illegal arrest to defeat a court's jurisdiction over him. At no point, did the Court tie the pronouncement to the particular evidentiary item that Sandoval-Sanchez had sought to suppress – a statement relating not to his identity, but to his avowed unlawful re-entry. *Id.* at 1037. Accordingly, nothing that the Court said remotely suggests that it sought to address the issue of whether derivative evidence obtained by direct exploitation of a Fourth Amendment violation involving acquisition of a person's name was subject to suppression nor whether evidence of the elicitation of the name itself could be suppressed.

After all, Sandoval-Sanchez's very presence in the United States constituted both a ground for his deportation and a continuing crime. *Id.* at 1047. Allowing him to invoke the exclusionary rule to suppress his "person" or "identity," as opposed to specified evidentiary fruits, would entirely defeat the jurisdiction of the immigration and the criminal courts. This is precisely the vice that the *Ker-Frisbie* rule seeks to prevent and the *Lopez-Mendoza* Court refused to countenance it: "When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free in this country." *Id.*

Petitioner is not similarly situated. He is charged with a single-act offense, not a continuing crime, and he contends only that discrete pieces of evidence – the police elicitation of his name to establish that he was driving at the time of the unlawful stop and the DMV records – were obtained in violation of the Fourth Amendment. He does not seek to suppress his "identity" to defeat

the jurisdiction of the court, but only the DMV records discovered as a direct fruit of the unconstitutional intrusion. If the State can demonstrate an independent source for the DMV records through evidence, not derived from the unlawful stop, establishing that petitioner was driving on the night in question, then the prosecution against him could proceed unimpaired. For that reason, *Lopez-Mendoza*'s invocations of the *Ker-Frisbie* doctrine do not aid respondent.

Respondent also relies on *Crews* (RB-29-30), but its purpose in doing so is not clear. To the extent that respondent invokes *Crews* simply to reiterate the familiar *Ker-Frisbie* principle that a defendant may not employ his illegal arrest to suppress his "face" or body for purposes of defeating a court's jurisdiction, petitioner has no quarrel with that. But respondent appears to go considerably farther. Indeed, respondent suggests that *Ker-Frisbie*, as interpreted in *Crews*, sweeps so broadly that it precludes suppression of in-court identification evidence as the tainted fruit of a Fourth Amendment violation. *See* RB-29 ("the Court [in *Crews*] viewed [the defendant's] efforts to suppress the victim's in-court identification as akin to challenging his own presence at trial.")

In fact, *Crews* did nothing of the sort. In Part 2B of its opinion, the Court squarely held that photographic and lineup identifications obtained in violation of the Fourth Amendment could "under some circumstances affect the reliability of the in-court identification and render it inadmissible as well." *Id.* at 472-73 & n.17, 18. In so stating, the Court noted the relevance of *Wong Sun* fruit analysis in making this determination. *Id.* at 473 n. 19. Justice Powell, writing for himself and Justice Blackmun, fully

concurred in this portion of the Court's opinion, agreeing that "the only evidence in issue in this case is the robbery victims' identification testimony" and that, on the facts presented, that testimony was not "tainted" by the Fourth Amendment violation. *Id.* at 477.[3] Thus, five justices plainly accepted the premise that, in the appropriate case, *Wong Sun* taint analysis could require suppression of in-court identification evidence as fruit of an illegal arrest.[4]

Respondent again invokes *Crews* in arguing that the exclusionary rule is not triggered when a suspect "comes to the attention" of police through an unlawful seizure and the police then exploit that knowledge to obtain additional evidence. Specifically, respondent asserts that, since the investigation in *Crews* "might never have progressed to trial" but for the unlawful photo identification, this Court's refusal to suppress the in-court identification necessarily heralded a rejection of traditional fruits analysis when the original Fourth Amendment violation yields evidence of a defendant's identity (RB-33-34). Respondent's argument ignores that this Court deemed the in-court identification admissible only after performing fruits analysis and finding no taint. *Crews*, 445 U.S. at 472-73 & n.19. This conclusion, which affirmed the express finding of the trial

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3. Justice Powell declined only to join in Part 2-D of the Court's opinion because it left open the possibility that a defendant himself – his "face" – could be a suppressible fruit of an illegal arrest, concluding that such suppression would violate *Ker-Frisbie*. *Id.* at 477.

4. Only Justice White, in a separate concurrence on behalf of himself, Justice Rehnquist and the Chief Justice, accepted respondent's proposition that a courtroom identification could never be suppressed even if it "resulted from exploitation of the defendant's Fourth Amendment rights." *Id.* at 479 n.*.

court, had strong record support because, before police had even obtained the improper photo identification, they knew that Crews matched the description of the assailant provided by the victims, a security guard had identified Crews as being present at one of the robbery scenes, and the police had obtained Crews' name during an encounter that did not violate the Fourth Amendment. *Id.* at 465-66. Respondent thus does not demonstrate that *Crews* did not engage in fruit analysis, it merely manifests its disagreement with the decision to do so.[5]

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5. Respondent's argument regarding *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), *later appeal* 274 F.2d 767 (D.C. Cir. 1960), suffers from a similar infirmity. Specifically, respondent suggests that the police would never have matched the untainted set of Bynum's fingerprints to those left at the crime scene, but for the initial match to Bynum's improperly obtained prints (RB-34-35). This claim ignores that, wholly apart from the improper fingerprint match, the police had knowledge that Bynum had initially injected himself into the robbery investigation by going to the precinct following his brother's arrest and had admitted that he owned the car sought in connection with the robbery. *Bynum*, 262 F.2d at 467, *as cited in Crews*, 445 U.S. at 476. As in *Crews*, there was ample basis to conclude that the second fingerprint match in *Bynum* was untainted by the earlier violation.

III. CAR STOPS THAT VIOLATE *DELAWARE V. PROUSE* FALL WITHIN THE CATEGORY OF DELIBERATE POLICE MISCONDUCT THAT THE EXCLUSIONARY RULE MOST EFFECTIVELY DETERS AND THE SOCIAL COSTS OF APPLYING THE EXCLUSIONARY RULE HERE ARE NO DIFFERENT FROM THOSE ASSOCIATED WITH THE CLASSIC APPLICATION OF THE RULE.

A. Application of the Exclusionary Rule to DMV Records is Necessary to Deter Violations of *Prouse*.

Respondent advances several arguments to support the position that application of the exclusionary rule to DMV records "would yield negligible, if any, deterrence benefits" (RB-39), but none withstands scrutiny.[6]

First, respondent argues that police would not evade the protections announced in *Prouse* to check the status of drivers' licenses because other lawful methods of accomplishing this goal exist. Specifically, respondent points to two alternatives – roadblocks and stops based on observed violations – that it claims obviate the police incentive to violate *Prouse*.

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6. In framing the cost-benefit analysis, respondent asserts that the "specter" of flagrant Fourth Amendment violations should have no bearing on this Court's determination (RB-37). But that specter is unavoidably implicated because the New York state courts concluded, and respondent here advocates, that DMV records can never be the fruit of the poisonous tree. If DMV records are never subject to the exclusionary rule, flagrant violations of *Prouse* will be undeterred.

The implementation of roadblocks require police resources well beyond impromptu suspicionless stops. Not only do roadblocks involve many more police officers than patrol car stops, but they require advanced planning and coordination. In this regard, roadblocks (1) need to be implemented pursuant to a *pre-determined, programmatic* objective and (2) that objective cannot be "to detect evidence of ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000). Thus, it is far easier for officers in the field to conduct an impromptu car stop than to use the legally and logistically demanding roadblock.

Respondent's other option – waiting for drivers to violate traffic laws – will also not be as attractive as sidestepping *Prouse*. Obviously, the suspicionless stop casts a far broader net than the observed offense approach. Also, the most common illegal stop is not completely random but based on an officer's "hunch" that falls short of reasonable suspicion. As to the hunch-based stop, the observed offense approach is typically useless. As respondent acknowledges in discussing the prospect of waiting for an individual to commit a traffic offense, "there is no telling when such a stop will occur" (RB-43).

Because respondent's alternatives are not nearly as easy and attractive as the impromptu stop, they do not minimize the strong incentive that would exist for the police to violate *Prouse*.

Second, respondent argues that forgoing application of the exclusionary rule to DMV records will not tempt the police to violate *Prouse* because, in its view, police do not purposely violate the constitution. This position is at

odds with the very premise of the exclusionary rule – that officers in the field have a strong incentive to "ferret[] out crime..." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Notably, this Court recently reiterated its view that police will be encouraged to violate the constitution if their actions will yield some benefit. *See Brendlin v. California*, 551 U.S. 249, 263 (2007) ("Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."). The effectiveness of the remedy explains this Court's continued allegiance to the rule where, as here, there is a strong causal relationship between the unlawful conduct and the discovery of evidence. *See Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in judgment).

Third, respondent argues that because an invalid car stop results in the suppression of any contraband found in the car, "the principal incentive to obey" the law will remain in effect (RB-41). But this argument is flawed. Leaving DMV records out of the equation, police currently have no incentive to stop drivers that appear to be obeying the law because these stops will yield no admissible evidence. Suspending application of the exclusionary rule to DMV records creates a *fresh* incentive to stop cars because police can gain access to evidence not subject to suppression. That the police would not be able to use other fruit discovered during the stop does not dull this fresh incentive because that other fruit would have been otherwise unobtainable. *See Brendlin*, 551 U.S. at 263 (allowing access to passenger in illegal car

stop would encourage police to stop cars without suspicion although fruits connected to the driver would be subject to exclusion).[7]

Moreover, suspension of the exclusionary rule's application to DMV records will almost certainly result in an end-run around the exclusion of other fruits obtained in the course of an unlawful car stop. If police, after an invalid stop, check DMV records and arrest a driver for driving without a license, a subsequent, properly conducted inventory search that yields physical contraband would likely be viewed as attenuated from the original illegality.

Furthermore, police have additional incentives to access a driver's DMV records because these records are increasingly linked to a sea of data that will be of high interest to police. *See* Brief of *amicus* Electronic Privacy Information Center (EPIC)-5 ("police officers can search from their squad cars an increasingly sophisticated network of government data systems, and obtain personal information once scattered across municipal, state, and federal criminal databases that would never have been available in the context of a routine stop."). With the

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7. The *amicus* New York State Association of Chiefs of Police, Inc. (NYSACP) argues that police have little interest in stopping drivers to ascertain whether they are properly licensed. *See* NYSACP Brief-7-8. But that position is at odds with this Court's recognition that "the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse*, 440 U.S. at 658. Surely, one of the primary obligations of state highway patrol officers, who are responsible for highway safety, is to identify those drivers who do not have a license.

primary means of deterring these checks removed, police will be tempted to access the wealth of information that such checks reveal. Because this data is often *private, personal* information (*See* Driver's Privacy Protection Act (DPPA), 18 U.S.C. §2721; EPIC Brief-10 (National Crime Information Center profiles, which are accessible by squad cars around the country, "contain a vast array of personal data")), the end result will be the proliferation of illegal stops that give police unfettered access to private matters. Disturbingly, these databases are often rife with inaccuracies and so the police will increasingly act on erroneous information. EPIC Brief-19.

Finally, respondent contends that other methods of regulating police behavior – namely, training and potential civil liability – adequately ensure that police will not purposely violate the constitution (RB-41-42). But where, as here, there exists a "sufficient causal relationship" between the unlawful conduct and the discovery of evidence, *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998), this Court has already made the judgment that the exclusionary remedy is far more effective at deterring misconduct than these alternatives. Moreover, if respondent prevails here, improved police training would likely have a perverse effect because police would surely learn that DMV records are insulated from the exclusionary rule. And, as noted, this Court has recognized that police will have a strong incentive to take advantage of such loopholes. *Brendlin*, 551 U.S. at 263.

B. The Social Costs of Applying the Exclusionary Rule to DMV Records do not Differ from the Rule's Traditional Application.

Respondent argues that if DMV records are suppressed, the practical effect will be that defendants will be effectively immunized "from future illegal conduct" (RB-43). Respondent's position rests on two premises – one, that operating a motor vehicle without a license is "akin to a continuing offense" and two, that after release from illegal arrest a defendant could commit the same driving offense with impunity. Both premises are untrue.

Respondent correctly acknowledges that unlicensed operation of a motor vehicle is "technically a single-act offense," but it argues that driving is different from other crimes because it "often" recurs (RB-42-43). That driving without a license is capable of repetition does not distinguish it from a host of other offenses to which the exclusionary rule traditionally applies. Drugs illegally recovered from a drug addict are subject to suppression although the offender's addiction is much more likely to compel him to reoffend than any compulsion the unlicensed driver may have to resume driving.

Moreover, the addict will more easily locate new drugs to purchase than an unlicensed driver will regain access to an automobile. In the short run, the car driven by the offender will typically be impounded. *See* N.Y. Veh. & Traf. Law (V.T.L.) §511-b (car to be impounded upon arrest for V.T.L. §511(3)(a) if, *inter alia*, operator is owner or if owner or another properly licensed person, authorized to operate and possess vehicle, is not present). Ultimately,

if and when the car is released to its registered owner,[8] the owner will be unlikely to permit the offender to use his car again. Thus, there is nothing about the offense of driving without a license that makes recurrence *more* likely than other offenses.

Additionally, an unlicensed driver who is released following an unlawful arrest will not be immunized from future illegal conduct. If the police who originally stopped the unlicensed driver subsequently observe the person driving, they would be authorized to arrest the driver because committing a new crime attenuates the illegality and thus precludes application of the exclusionary rule. *See United States v. Garcia-Jordan*, 860 F.2d 159 (5th Cir. 1988) (commission of crime following unlawful arrest attenuates original illegality); *accord United States v. Awadallah*, 349 F.3d 42, 81 & n.8 (2d Cir. 2003)(Straub, J., concurring) (it has long been recognized that it would be "an unwarranted extension of [the fruit of the poisonous tree] doctrine to apply it . . . to a new wrong committed by the defendant.") (citation omitted); *United States v. Pryor*, 32 F.3d 1192, 1195-96 (7th Cir. 1994); *United States v. King*, 724 F.2d 253, 256 (1st Cir. 1984); *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982).[9]

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8. A vehicle will not be released to the individual who was driving without a license unless that person has in the meantime secured a valid license. *See* V.T.L.§511-b(2).

9. The United States's concern that application of the exclusionary rule to government records would immunize from prosecution aliens who have illegally reentered the country is similarly unfounded (*amicus* brief for United States at 28-29). This Court could reasonably determine that the cost of applying the exclusionary rule to alien files would be unacceptably high because illegal reentry is, unlike unlicensed driving, a continuing crime. In

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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any event, because aliens illegally reentering the country continue to offend even after release from an unconstitutional arrest, their post-release re-offense vitiates application of the exclusionary rule. *See Garcia-Jordan*, 860 F.2d 159.

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In the Supreme Court of the United States

JOSE TOLENTINO, PETITIONER

v.

STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether preexisting government records are subject to the exclusionary rule when law enforcement ascertains a defendant's identity as the result of a Fourth Amendment violation and uses his identity to access those records.

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JOSE TOLENTINO, PETITIONER

v.

STATE OF NEW YORK

ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether preexisting government records are subject to the exclusionary rule when law enforcement officers ascertain a defendant's identity as the result of a Fourth Amendment violation and use his identity to access those records. Because the Court's resolution of that question could affect the admissibility of evidence in federal criminal prosecutions under similar circumstances, the United States has a substantial interest in this case.

STATEMENT

Following the state trial court's denial of petitioner's motion to suppress Department of Motor Vehicle (DMV) records, petitioner entered a guilty plea. J.A. 85a-90a. Petitioner was convicted of one count of first-degree

aggravated unlicensed operation of a motor vehicle, in violation of N.Y. Veh. & Traf. Law § 511(3)(a)(ii), and sentenced to five years of probation. J.A. 91a-94a. The intermediate state appellate court and New York Court of Appeals affirmed. J.A. 95a-97a, 98a-111a.

1. On January 1, 2005, New York City police officers stopped the car that petitioner was driving because he was playing music too loudly. J.A. 98a. The officers learned petitioner's name and ran a computer check of state DMV records. J.A. 98a-99a. When that check revealed that petitioner's license had been suspended and that he had received at least ten suspensions on different dates for failure to answer a summons or pay a fine, the officers arrested petitioner. J.A. 4a, 99a.

2. a. Petitioner was subsequently indicted on one count of aggravated unlicensed operation of a motor vehicle in the first degree, in violation of N.Y. Veh. & Traf. Law § 511(3)(a)(ii). J.A. 6a. Petitioner filed a pretrial motion to suppress the DMV records, or, in the alternative, for the trial court to hold a hearing on that motion.[1] J.A. 15a-18a. Petitioner argued that the stop of his car violated the Fourth Amendment and that the evidence revealed as a result of the stop, *i.e.*, the DMV records, should be suppressed as fruits of an unlawful seizure. J.A. 25a-35a. Petitioner acknowledged that his DMV records "were in existence in computerized form prior to [his] arrest," but contended that the records remained a suppressible fruit because the police would

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[1] Petitioner also sought to suppress, *inter alia*, his statement to the arresting officers admitting that he lacked a New York driver's license. J.A. 35a-37a; see J.A. 8a. With respect to that issue only, the trial court ordered a hearing on probable cause and voluntariness. J.A. 77a. That issue has not been litigated further. The question presented is limited to the suppressibility of the preexisting DMV records.

not have accessed those records "[b]ut for [his] unlawful seizure." J.A. 28a (emphasis omitted), 31a.

The State responded that petitioner had not been stopped in violation of the Fourth Amendment and that, even if the stop had been unlawful, the DMV records were not a suppressible fruit of that stop. J.A. 68a-74a. In support of the latter argument, the State relied on, *inter alia*, this Court's statement that "[t]he 'body' or identity of a defendant . . . is never itself suppressible as fruit of an unlawful arrest," J.A. 70a (emphasis omitted) (quoting *INS* v. *Lopez Mendoza*, 468 U.S. 1032, 1039 (1984)), and federal appellate decisions holding that "there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence," J.A. 71a (quoting *United States* v. *Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir.), cert. denied, 513 U.S. 975 (1994)). The State further contended that the DMV records should not be subject to the exclusionary rule because the records "were in the possession of a public agency before" petitioner's detention and, as such, were "not the product of the stop." *Ibid.*

b. The trial court denied petitioner's motion to suppress the DMV records. J.A. 76a-78a. The court did not decide whether the stop of petitioner's car violated the Fourth Amendment, but determined that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis." J.A. 78a. Petitioner thereafter entered a guilty plea. J.A. 85a-90a.

c. A three-judge panel of the Appellate Division affirmed. J.A. 95a-97a. The panel disagreed with the trial

court's view that petitioner must establish a privacy interest in the alleged fruit of the constitutional violation for that evidence to be suppressed. J.A. 96a. But the panel nonetheless concluded that, under this Court's decision in *Lopez-Mendoza*, *supra*, a defendant's identity is never suppressible as the fruit of an unlawful arrest and that, as a result, DMV records derived from that identity are also "not suppressible fruits." *Ibid.* It was likewise significant, the court reasoned, that "the DMV records [had been] compiled independently of [petitioner's] arrest." *Ibid.*

3. a. The New York Court of Appeals affirmed by a 5-2 vote. J.A. 98a-111a. The court observed that, in light of *Lopez-Mendoza*, petitioner "did not argue that his name or identity would be subject to suppression as a fruit of the allegedly unlawful stop." J.A. 100a-101a. Rather, the court explained, petitioner "claim[ed] that the preexisting DMV records [were] subject to suppression because," absent the allegedly unlawful stop, "the police would not have learned his name and would not have been able to access [his] records." J.A. 101a.

Without addressing the lawfulness of the traffic stop, the court rejected the suppression claim. The court first analyzed federal appellate decisions holding that, pursuant to *Lopez-Mendoza*, the exclusionary rule did not apply to government immigration records accessed using a suspect's identity obtained through an unlawful arrest. J.A. 101a (citing cases from the Third, Fifth, Ninth, and Eleventh Circuits). Under *Lopez-Mendoza* and those authorities, the court reasoned, the DMV records "were * * * not suppressible as the fruit of the purportedly illegal stop." J.A. 102a. The court found additional support in "the nature of the records at issue, which were public records already in the possession of

the authorities." *Ibid.* Although "[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained," the court explained, "it does not reach backward to taint information that was in official hands prior to any illegality." *Ibid.* (quoting *United States* v. *Crews*, 445 U.S. 463, 475 (1980) (opinion of Brennan, J.)).

The court also concluded that the costs of applying the exclusionary rule to preexisting government files accessed through the defendant's identity outweighed the deterrence benefits. J.A. 104a. Excluding such evidence "would undermine the administration of the criminal justice system" and could have the same effect as "allow[ing] suppression of the court's jurisdiction." *Ibid.* By contrast, the court saw "few deterrence benefits": police officers already had little incentive to conduct random vehicle stops because any other "evidence recovered in the course of an illegal stop remains subject to the exclusionary rule," *ibid.*, and, because "identity-related evidence is not unique," the prosecution could often collect such evidence by other means and reindict the defendant. *Ibid.* (quoting *United States* v. *Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir.), cert. denied, 130 S. Ct. 74 (2009)).

The court distinguished this Court's decisions in *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Hayes* v. *Florida*, 470 U.S. 811 (1985), which had applied the exclusionary rule to fingerprint evidence. The court pointed out that, unlike the DMV records in this case, the fingerprints excluded in *Davis* and *Hayes* did not predate the unlawful detention and that, unlike petitioner, the defendants in those cases were detained for the specific purpose of obtaining fingerprints to connect them to a crime then under investigation. J.A. 105a.

For those reasons, the court concluded, its holding —"that a defendant may not invoke the fruit-of-the-poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name"—"would not alter the outcome" of *Davis* or *Hayes*. *Ibid.*

b. Two judges dissented. J.A. 105a-111a. The dissenting opinion contended that the majority's ruling rested "on a misreading" of the statement in *Lopez-Mendoza*, 468 U.S. at 1039, that the body or identity of a defendant is never itself suppressible. J.A. 106a-107a. In the dissenters' view, that statement meant that a defendant's identity cannot be suppressed "to defeat a court's jurisdiction over" him, but did not address the "admissibility of identity evidence" in a criminal proceeding. J.A. 107a. The dissent asserted that this Court's decisions in *Davis* and *Hayes* had established that "identity-related evidence can and should be subject to the exclusionary rule." J.A. 108a. A contrary rule, according to the dissent, would give police officers an incentive to illegally stop individuals solely to discover their identity and use it to search government records. J.A. 109a. Finally, the dissent rejected the majority's reliance on the nature of the DMV records, reasoning that the records were not obtained "independent of any illegality" because the police had "located these specific records only by relying on identifying information" learned during the allegedly illegal stop. *Ibid.*

SUMMARY OF ARGUMENT

When police officers learn a defendant's name from an allegedly unlawful stop and use his name to access public records, suppression of those preexisting records

is unwarranted. This Court's precedents make that conclusion clear.

A. 1. As this Court has recognized, "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Petitioner's claim (Br. 26-28) that this broad rule applies only when suppression would defeat a court's jurisdiction cannot be reconciled with *Lopez-Mendoza*, 468 U.S. at 1043, which clearly relies on it when discussing the admissibility of evidence as well. Because petitioner's identity itself is not suppressible (which petitioner does not dispute), it follows that the DMV records accessed by use of his identity are likewise not suppressible.

2. The argument for suppression is particularly weak in this case because the DMV records were lawfully in the State's possession before the allegedly unlawful stop. The exclusionary rule "does not reach backward to taint information that was in official hands prior to any illegality." *United States* v. *Crews*, 445 U.S. 463, 475 (1980) (opinion of Brennan, J.). Because the unlawful stop "served merely to link together" petitioner with the DMV records, *ibid.*, exclusion of those records is not appropriate. The "independent source" doctrine provides analogous support. Given that the State possessed the DMV records before the allegedly unlawful stop, the records were "acquired in a fashion untainted by" that stop, *i.e.*, independent of any illegality that may have alerted the officers to their significance. *Murray* v. *United States*, 487 U.S. 533, 537-538 (1988).

B. 1. The exclusionary rule applies only where its deterrence benefits outweigh its substantial social costs. *E.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006).

2. Extension of the exclusionary rule to the present context would provide only marginal deterrence of unconstitutional vehicle stops. Established law already requires suppression of contraband or other evidence of more serious crimes uncovered during an unlawful stop. Limited police resources, the risk to officer safety, the availability of alternative means to run motor-vehicle checks, and the threat of internal discipline and civil liability further reduce the likelihood of suspicionless vehicle stops designed to detect traffic violations.

3. In addition to undermining the truthfinding process and allowing criminal conduct to go unpunished, adoption of the broad exclusionary rule petitioner seeks would risk—at least in other analogous contexts—perpetuating an ongoing violation of law. *Lopez-Mendoza*, 468 U.S. at 1046-1047. It would also increase the frequency and complicate the resolution of suppression hearings. Those substantial costs, taken together, outweigh any marginal deterrence that exclusion might provide in this context.

4. Contrary to petitioner's contention (Br. 41-44), the record does not suggest a flagrant constitutional violation (assuming any violation occurred). Nor do this Court's pertinent precedents suggest that flagrancy would be relevant here. In any event, the decision below does not address the possibility of suppression in a case where such conduct actually occurs. It would be premature to consider that circumstance here.

ARGUMENT

SUPPRESSION OF PREEXISTING GOVERNMENT RECORDS IS UNWARRANTED WHEN THE POLICE LEARN THE DEFENDANT'S IDENTITY AS THE RESULT OF A FOURTH AMENDMENT VIOLATION AND USE HIS IDENTITY TO ACCESS THOSE RECORDS

Petitioner seeks to suppress motor-vehicle records already in the State's possession and accessed using petitioner's name, because his name was obtained through an allegedly unlawful traffic stop. As this Court has recently observed, however, "exclusion 'has always been our last resort, not our first impulse,' and our precedents establish important principles that constrain application of the exclusionary rule." *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009) (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006)). Two of those principles compel rejection of petitioner's claim: (1) a defendant's identity is not a suppressible fruit, see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984), and (2) preexisting government records linked to that identity are also not a suppressible fruit, see *United States* v. *Crews*, 445 U.S. 463, 475 (1980) (opinion of Brennan, J.). Any marginal deterrence benefits do not outweigh the costs of suppression. An unprecedented extension of the exclusionary rule to this context is unjustified.

A. Preexisting Government Files Accessed Through A Defendant's Identity Are Not Subject To The Exclusionary Rule Under This Court's Precedents

1. A defendant's identity and evidence derived therefrom are not suppressible fruits of an unlawful seizure

Petitioner did not argue before the New York Court of Appeals (J.A. 101a), and does not argue before this Court, that his identity itself should be suppressed. Petitioner nevertheless contends (Br. 26-28) that "identity-related evidence" (*i.e.*, evidence of or derived from a defendant's identity) generally is subject to the exclusionary rule in criminal proceedings. This Court's precedents refute that contention: if, as those precedents hold, identity itself is not suppressible in criminal or civil proceedings, then *a fortiori* evidence accessed directly through use of that identity is not suppressible.

a. A person's identity is a basic part of any encounter he has with the criminal justice system. When police suspect someone of criminal activity, they are likely to pose "questions concerning [the] suspect's identity [as] a routine and accepted part" of any investigatory stop. *Hiibel* v *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). Even absent suspicious criminal activity, law enforcement may still ask individuals about their identity or for identification without implicating the Fourth Amendment. See *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). At the initial investigatory stage, the officers' knowledge of the individual's identity serves important interests. Knowing that "a suspect is wanted for another offense, or has a record of violence or mental disorder," can alert the officer to the need to call for backup or to take additional safety measures. *Hiibel*, 542

U.S. at 186. "On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere." *Ibid.*

When the interaction with law enforcement results in arrest and criminal prosecution, the suspect's identity becomes a foundational element of the judicial proceedings. "In every criminal case," the Court has explained, "it is known and must be known who has been arrested and who is being tried." *Hiibel*, 542 U.S. at 191. That is true regardless of whether the initial arrest that resulted in bringing the suspect before the court conformed to the requirements of the Fourth Amendment. See *Crews*, 445 U.S. at 474. The rule, as the Court described in *Lopez-Mendoza*, therefore has long been established that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. at 1039; see also *Crews*, 445 U.S. at 479 ("[A] majority of the Court agrees that the rationale of *Frisbie* [v. *Collins*, 342 U.S. 519 (1952)] forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest.") (White, J., concurring in the result).

b. Petitioner is correct (Br. 27) that this Court's statement in *Lopez-Mendoza* encompasses the established rule—which petitioner labels a jurisdictional one—that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction" by virtue of an unlawful arrest or detention. *Frisbie*, 342 U.S. at 522; see *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (an "illegal arrest or detention does not void a subsequent conviction"). The Court applied that rule to one of the two alien respon-

dents in *Lopez-Mendoza*. That respondent (Lopez-Mendoza himself) had moved to terminate deportation proceedings based on the allegation that he had been summoned before the immigration court following an unlawful arrest. 468 U.S. at 1035, 1040. This Court summarily rejected Lopez-Mendoza's claim, agreeing with the immigration courts that his "illegal arrest ha[d] no bearing on [the] subsequent deportation proceeding." *Id.* at 1040.

The Court's treatment of the other respondent (Sandoval-Sanchez) in *Lopez-Mendoza*, however, makes clear that its broad statement about the non-suppressibility of a suspect's identity applies to more than just a tribunal's authority over an unlawfully detained suspect. Sandoval-Sanchez sought to exclude evidence from his deportation proceeding—specifically, his oral admission to an immigration officer that he had entered unlawfully as well as the written record of that admission. *Lopez-Mendoza*, 468 U.S. at 1037-1038, 1040. Although calling Sandoval-Sanchez's claim "more substantial" than that of the other respondent, *id.* at 1040, the Court rejected it on the ground that the exclusionary rule does not apply in civil deportation proceedings, *id.* at 1040-1050.

Critical to that conclusion (and to the question presented here) was the Court's reasoning in the following passage ignored by both petitioner and the dissent below:

> [S]everal other factors significantly reduce the likely deterrent value of the exclusionary rule in a civil deportation proceeding. First, regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation. As the BIA has

> recognized, in many deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place, and manner of entry." *Matter of Sandoval*, 17 I. & N. Dec., at 79. *Since the person and identity of the respondent are not themselves suppressible, see supra, at 1039-1040*, the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest.

Lopez-Mendoza, 468 U.S. at 1043 (emphasis added). In referring back to the portion of its opinion declaring that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest," *id.* at 1039, the Court eliminated any doubt that the statement precluded application of the exclusionary rule, not just in the "jurisdictional" sense, but also in the ordinary evidentiary sense.

Contrary to petitioner's characterization of *Lopez-Mendoza* (Br. 26-28), and consistent with the reading of the New York Court of Appeals (J.A. 100a-101a), the Court's statement that a defendant's identity is "never" suppressible as the fruit of an unlawful arrest therefore applies in this context. To the government's knowledge, this Court has never required the suppression of evidence found solely through the otherwise lawful use of information or material that is not itself suppressible. And that fact should not be surprising: logic suggests that the lawful use of admissible evidence to procure further admissible evidence is permissible. The fruit-of-the-poisonous-tree doctrine requires in the first instance a tainted branch, and absent that tainted branch, its

fruit is not forbidden. Accordingly, because petitioner's identity is not suppressible, the state DMV records accessed with the use of his identity are likewise not suppressible.

c. Petitioner contends (Br. 24-25) that this conclusion contravenes the Court's decisions in *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Hayes* v. *Florida*, 470 U.S. 811 (1985). As the court below explained (J.A. 105a), however, *Davis* and *Hayes* are readily distinguishable. In both cases, the police, after interrogating and fingerprinting dozens of other young males, detained the defendants without warrant or probable cause for the sole purpose of fingerprinting them and linking them to a specific crime by comparing their fingerprints to those found at the crime scene. See *Davis*, 394 U.S. at 722-723; *Hayes*, 470 U.S. at 812-813. This Court held that the detentions violated the Fourth Amendment and that the fingerprints taken during them were suppressible fruits of that violation. *Davis*, 394 U.S. at 723-728; *Hayes*, 470 U.S. at 813-818.

Neither *Davis* nor *Hayes* suggests that a defendant's identity itself is subject to suppression. Indeed, the identities of the defendants in both *Davis* and *Hayes* were already known to the authorities, who did not fingerprint the defendants to determine who they were. Nor did the Court address the exclusion of preexisting evidence, such as the fingerprints obtained from the crime scene before the unlawful detentions, much less other preexisting government records. In sum, neither *Davis* nor *Hayes* precludes application in this context of the general rule that a defendant's identity and evidence derived therefrom are not suppressible fruits of an unlawful seizure.

2. *Suppression Is Especially Inappropriate When A Defendant's Identity Is Used To Access Records Already In The Government's Possession*

As argued above (Part A.1, *supra*), because a defendant's identity is not subject to the exclusionary rule, any evidence discovered by the government's lawful use of that identity should not be suppressed. See J.A. 105a (holding no suppression "when the only link between the improper police activity and the disputed evidence is that the police learned the defendant's name"). But this Court need not pronounce such a broad (albeit sound) rule to decide this case. Rather, this case involves the far more limited circumstance of the government's use of a defendant's identity to access records *already in its possession*. See J.A. 102a (rejecting application of exclusionary rule in part because DMV records "were public records already in the possession of authorities" before the stop). Both precedent and policy dictate that preexisting government records are not to be suppressed.

a. This Court has held that the exclusionary rule (where applicable) generally bars evidence, both tangible and testimonial, derived directly or indirectly from an unlawful search or seizure (until the connection becomes too attenuated). See, *e.g.*, *Murray* v. *United States*, 487 U.S. 533, 536-537 (1988). Such fruits, however, have consisted only of information or materials that come into the government's possession for the first time as a result of the Fourth Amendment violation. See Pet. Br. 22-23 (citing cases). To the government's knowledge, this Court has never required the suppression of evidence lawfully in the government's possession before an unlawful search or seizure. Where the unlawful search or seizure simply reveals the significance of re-

cords already in the government's possession, those records are not subject to suppression.

Contrary to petitioner's contention (Br. 33-35), that principle follows from this Court's decision in *Crews*, *supra*. In *Crews*, the Court held without dissent that a victim-witness's in-court identification of the defendant was not suppressible as a fruit of the defendant's unlawful arrest. 445 U.S. at 470; *id.* at 477 (Powell, J., concurring in part); *ibid.* (White, J., concurring in the result). The Court explained that the witness had based her testimony on her memory of the defendant's appearance from the crime itself. *Id.* at 471-473. A plurality* of the Court reasoned that, before arresting the defendant, "the police had already obtained access to the 'evidence' that implicated him in the robberies, *i.e.*, the mnemonic representations of the criminal retained by the victims." *Id.* at 475. Accordingly, the "unlawful arrest served merely to link together two extant ingredients in his identification." *Ibid.* The unlawful arrest did not require suppression in that case, the plurality concluded, because "[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." *Ibid.*

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* Justice Brennan was joined by Justices Stewart and Stevens for the last portion of his opinion (the rest of which constituted a majority opinion for the Court). *Crews*, 445 U.S. at 474 n.*. As petitioner acknowledges (Br. 34 n.7), however, the other Justices did not join that portion of Justice Brennan's opinion only because they would have adopted a *broader* rule that a defendant's face can never be a suppressible fruit of an unlawful arrest—an issue they believed Justice Brennan had left open, 445 U.S. at 477—not out of any disagreement with the plurality's reasoning as far as it went. *See ibid.* (Powell, J., concurring in part); *id.* at 477-478 (White, J., concurring in the result).

In support of its conclusion, the plurality relied on the D.C. Circuit's decision in *Bynum* v. *United States*, 262 F.2d 465 (1958), a case that the Court had previously "cited with approval" in *Davis*, 394 U.S. at 724-725 & n.4. See *Crews*, 445 U.S. at 476. The court of appeals in *Bynum* had ordered the suppression of fingerprints that the police took after unlawfully arresting the defendant on robbery charges. Following that ruling, the defendant was reindicted for the same charges, on the strength of "an older set of his fingerprints, taken from an FBI file, that were in no way connected with his unlawful arrest." *Ibid.* The court of appeals upheld the conviction that followed the reindictment. *Bynum* v. *United States*, 274 F.2d 767 (D.C. Cir. 1960) (per curiam). Use of the older set of fingerprints already in the FBI's file in *Bynum* was proper, the *Crews* plurality explained, because they "antedated the unlawful arrest and were thus untainted by the constitutional violation." 445 U.S. at 477. And in *Maryland* v. *Macon*, 472 U.S. 463 (1985), the Court reiterated that a violation cannot reach back and taint records already lawfully in the government's possession. *Id.* at 471 (citing *Crews*, 445 U.S. at 475 (opinion of Brennan, J.)).

Even Justice White's dissent in *Lopez-Mendoza* supports the same conclusion. Although Justice White would have applied the exclusionary rule to an alien's statements in that case, he acknowledged that preexisting immigration files would be admissible in a criminal prosecution under 8 U.S.C. 1326 for illegal reentry or presence after deportation—even when the impetus to locate those files came from an unlawful arrest. See *Lopez-Mendoza*, 468 U.S. at 1057. Specifically, in discussing Section 1326 prosecutions, Justice White stated:

> [T]he Government will have a record of the prior deportation and will have little need for any evidence that might be suppressed through application of the exclusionary rule. See *United States* v. *Pineda-Chinchilla*, 712 F.2d 942 (CA5 1983) (illegality of arrest does not bar introduction of INS records to demonstrate prior deportation), cert. denied, 464 U.S. 964 (1983).[3]

Ibid. That passage reinforces the common-sense conclusion that preexisting government records—even those put in the hands of the relevant law-enforcement or prosecuting officials only as a result of a Fourth Amendment violation—fall outside the scope of the exclusionary rule.[4]

The identical logic applies to the DMV records in this case, which petitioner concedes existed in a state government database before the unlawful stop. J.A. 31a. That the police had not pursued a specific investigation into petitioner's driving habits before the stop does not

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[3] Although the government agrees with Justice White's conclusion and the holding in *Pineda-Chinchilla*, the government does not here rely on the Fifth Circuit's rationale in that case, *i.e.*, that the records are not suppressible because aliens have no privacy or property interest in them. 712 F.2d at 944.

[4] Notwithstanding *Lopez-Mendoza*, the courts of appeals are in conflict over whether preexisting immigration files are subject to suppression in a Section 1326 prosecution when the police stop a defendant in violation of the Fourth Amendment, learn his or her identity, and use that identity to check those immigration files. See Pet. 27 (collecting cases). Although Section 1326 prosecutions are analogous to the present case, they differ in at least one important respect: the "inevitable discovery" doctrine applies more directly in the Section 1326 context because the ensuing civil deportation proceedings would result in an untainted set of fingerprints, which would provide an independent basis for linking the alien to his immigration file.

mean, as petitioner contends, that his driving records were not in official hands "in any meaningful sense" at that point. Br. 30, 35. After all, the witness's memory in *Crews*, the FBI-file fingerprints in *Bynum*, and the immigration files in *Lopez-Mendoza* all predated the allegedly unlawful arrest. None of those items of evidence was a suppressible fruit, however, even though the relevant law-enforcement authorities became aware of their significance with respect to a particular defendant only as a result of the unlawful arrest. So too here, suppression is not warranted simply because the unlawful stop allowed law enforcement to "link together" petitioner with the preexisting DMV records. *Crews*, 445 U.S. at 475; cf. *Segura* v. *United States*, 468 U.S. 796, 815 (1984) ("This Court has never held that evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.") (internal quotation marks omitted).

b. Anticipating an argument under the "independent source" doctrine based on the State's prior possession of the DMV records, petitioner argues (Br. 30-36) that the doctrine does not preclude suppression of those records. As an initial matter, the New York Court of Appeals did not rely *per se* on the "independent source" doctrine as a justification for holding the records admissible. See J.A. 102a. Similarly, the arguments of both respondent and the United States against suppression in this case speak primarily to the threshold inapplicability of the exclusionary rule and are therefore distinct from formal application of "independent source" doctrine. Petitioner's discussion is thus largely inapt.

To the extent the "independent source" framework is useful, it supports the admissibility of preexisting government records. The concept of "independent source"

has been invoked in two different senses: (1) where evidence is "acquired in a fashion untainted by the illegal evidence-gathering activity"; and (2) where evidence "acquired by an untainted search * * * *is identical to the evidence unlawfully acquired.*" *Murray*, 487 U.S. at 537-538. The reference to "independent source" in the court below is best understood as invoking the first, more general sense. Although the police did not obtain petitioner's identity though means independent of the unlawful stop, petitioner does not (and cannot) seek to suppress his identity. Rather, he seeks only to suppress the DMV records at issue. It is undisputed that the State lawfully possessed the DMV records *before* the unlawful stop; therefore, the records necessarily were "acquired in a fashion untainted" by that stop. (Indeed, for that reason, the second, more specific use of the doctrine—on which petitioner focuses (Br. 32-33)—is inapposite here: the DMV records were not "unlawfully acquired" in the first place.) Because the records themselves are independent of any illegality that may have alerted individual officers to their significance, they should be admissible. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 279-280 (1961) (information government acquired before illegal wiretap not suppressible even though wiretap "prompted the calling of [defendant] before the county grand jury").

The only way that petitioner can avoid that conclusion is by drawing a sharp distinction between *government acquisition and possession* of evidence (indisputably untainted from any unlawful stop) and *law-enforcement use* of that evidence (triggered by the unlawful stop). *E.g.*, Pet. Br. 30 ("the information was not possessed *by law enforcement* in any meaningful sense until the police unearthed it") (emphasis added); *id.* at

33 ("the *police* did not discover that petitioner's license had been suspended by means independent of the unlawful seizure") (emphasis added). Not only does such a distinction lack support in this Court's Fourth Amendment precedents (see pp. 16-19, *supra*), but it would create difficult line-drawing problems. For example, if the database at issue were a joint NYPD-DMV project, presumably then the records could have been considered in police possession before the unlawful stop. Or if the arresting officer happened to have prior knowledge of petitioner's suspended license (due to a prior encounter or a small-town setting), presumably the records could be deemed to already have been "'in official hands' in a[] meaningful sense." Pet. Br. 35. Application of the exclusionary rule should not turn on such arbitrary distinctions.

B. The Costs Of Excluding Preexisting Government Files Outweigh Any Marginal Deterrence From Suppression

In addition to holding that petitioner's DMV records were not suppressible under this Court's precedents governing identity-related evidence, the New York Court of Appeals correctly determined that suppression was unwarranted because the substantial costs of excluding the records outweighed the "few deterrence benefits" that suppression might provide. J.A. 104a.

1. The deterrence benefits of exclusion must outweigh its substantial social costs

Suppression is not "a necessary consequence of [the] Fourth Amendment violation" assumed by the state courts in this case. *Herring*, 129 S. Ct. at 700; see *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context [is] an issue separate from the

question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."). To the contrary, "the extreme sanction of exclusion" applies "only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs." *Herring*, 129 S. Ct. at 700 (quoting *United States* v. *Leon*, 468 U.S. 897, 916 (1984)); *Hudson*, 547 U.S. at 591 (internal quotation marks and citation omitted).

Based on such a cost-benefit analysis, the Court has "significantly limited" application of the exclusionary rule, even in the context of criminal trials. *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 n.4 (1998).[5] The Court has held the rule inapplicable, for example, when a police officer reasonably relies on a search warrant that is later deemed unlawful, *Leon*, 468 U.S. at 920-922; when an officer reasonably relies on a state statute later held unconstitutional, *Illinois* v. *Krull*, 480 U.S. 340, 349-350 (1987); when an officer arrests a suspect based on a warrant that a police department or judicial branch employee mistakenly lists as outstanding in a computer database, *Herring*, 129 S. Ct. at 704; *Arizona* v. *Evans*, 514 U.S. 1, 14-16 (1995); when an officer violates the Fourth Amendment's knock-and-

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[5] The Court also has held that the exclusionary rule is categorically inapplicable in various types of proceedings other than a criminal trial —*e.g.*, in grand jury proceedings, *United States* v. *Calandra*, 414 U.S. 338, 347-352 (1974); in federal habeas corpus proceedings where the prisoner has had a full and fair opportunity to litigate his Fourth Amendment claim in the state court system, *Stone* v. *Powell*, 428 U.S. 465, 494 (1976); in federal civil tax proceedings where evidence was illegally seized by state officials, *United States* v. *Janis*, 428 U.S. 433, 459-460 (1976); and in parole revocation hearings, *Scott*, 524 U.S. at 364.

announce requirement, *Hudson*, 547 U.S. at 599; and when police have an "independent source" for the tainted evidence, *Murray*, 487 U.S. at 537-538. That analysis supports the same conclusion in this context.

2. ***The deterrence benefits of exclusion would be minimal***

Subjecting a defendant's preexisting government records to the exclusionary rule would not result in the appreciable deterrence that this Court has required. See, *e.g.*, *Herring*, 129 S. Ct. at 704. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. Petitioner asserts that, absent an exclusionary remedy, police will have a strong incentive to conduct "arbitrar[y]," suspicionless vehicle stops to check driver's licenses and registration (Br. 39-41)—the category of stops that this Court held unconstitutional in *Delaware* v. *Prouse*, 440 U.S. 648, 658-659 (1979). But petitioner vastly overstates the incentive of law enforcement to conduct random vehicle stops designed to uncover evidence of traffic violations.

a. As an initial matter, as the New York Court of Appeals explained, officers face a powerful deterrent against contravening this Court's decision in *Prouse*—namely, that all other "evidence recovered in the course of an illegal stop remains subject to the exclusionary rule." J.A. 104a; see *People* v. *Cobb*, 703 N.Y.S.2d 341, 345 (N.Y. Crim. Ct. 1997) (listing weapons, drugs, and proof of driver's intoxication as evidence likely to be discovered during vehicle stops). In *Prouse* itself, for example, the officer who conducted the unlawful vehicle stop smelled marijuana as he approached the vehicle and eventually seized drugs that he "found in plain view

on the car floor." 440 U.S. at 650. It was the suppression of that contraband, not any evidence that the driver had violated traffic or vehicle regulations, that this Court upheld. *Id.* at 650, 663.

Petitioner presumes that police officers are more interested in running a records check that might reveal a motor-vehicle violation than they are in recovering contraband or other evidence of serious crimes, which would have to suppressed if seized during an unlawful stop. But petitioner offers no support for his speculation, which runs counter to the commonsense notion that "police [will] necessarily shape their conduct in auto stops in anticipation that other evidence derived therefrom would be subject to exclusionary rule sanctions." *Cobb*, 703 N.Y.S.2d at 345.

This Court employed similar reasoning in declining to apply the exclusionary rule in *New York* v. *Harris*, 495 U.S. 14 (1990). In *Harris*, the defendant made an inculpatory written statement at the police station after officers had arrested him in violation of *Payton* v. *New York*, 445 U.S. 573 (1980), which held that the Fourth Amendment requires a warrant (or consent) before police can enter a suspect's home to arrest him. *Harris*, 495 U.S. at 16. This Court rejected the defendant's argument that suppressing his station-house statement was necessary to deter the police from violating the rule established in *Payton*. The Court instead concluded that the police's knowledge that "any evidence found, or statements taken, inside the home" remained subject to suppression was a sufficient "incentive" to heed *Payton*'s proscription. *Id.* at 20. So too here, law enforcement's incentive to obey *Prouse* remains because police officers know that anything other than records linked to a driver's identity will be subject to suppres-

sion as the product of an unlawful stop. J.A. 104a; accord *Cobb*, 703 N.Y.S.2d at 345-346 ("The potential for suppression of this other evidence is a sufficient safeguard against unlawful and precipitous police action.").

b. Petitioner also overlooks the other existing deterrents to the vehicle stops condemned in *Prouse*. As a practical matter, random stops of the sort envisioned by petitioner are unlikely to find favor within police departments for several different reasons. Vehicle stops strain "limited police resources" by occupying officers and equipment that could be deployed to prevent and investigate crime elsewhere. See *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004). Each stop also poses significant risks to officer safety. See *Arizona* v. *Johnson*, 129 S. Ct. 781, 786 (2009) ("[T]raffic stops are 'especially fraught with danger to police officers.'") (quoting *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983)). To the extent that random stops became widespread, moreover, they might well engender "community hostility" and thus undermine law enforcement's ability to prevent and solve crimes. Cf. *Lidster*, 540 U.S. at 426.

At the same time, police officers intent on inquiring into the status of a car or its owner have at their disposal means both more efficient and less risky than suspicionless roadside stops. Unlike at the time of *Prouse*, when officers would have had to contact a dispatcher by radio, police cars equipped with mobile computers allow officers to run a database check on the vehicle's license plate. That check will often inform the officer of the identity of the vehicle's registered owner and other basic facts about the vehicle, including whether it has been reported stolen. See *State* v. *Donis*, 723 A.2d 35, 36-37 (N.J. 1998). Officers who can avail themselves of that search technique—which does not implicate the driver's

Fourth Amendment rights, see *United States* v. *Diaz-Castaneda*, 494 F.3d 1146, 1150-1152 (9th Cir.) (collecting cases holding that database check of license plate is not a search under the Fourth Amendment), cert. denied, 552 U.S. 1031 (2007)—have little incentive to spend the time and incur the risk of a vehicle stop to investigate motor-vehicle infractions that they have no reasonable basis to believe actually occurred. Cf. *Hudson*, 547 U.S. at 597 (declining to "assume that exclusion in [a specific] context is necessary deterrence simply because [the Court] found that it was necessary deterrence in different contexts and long ago").

Beyond such "[p]ractical considerations," *Lidster*, 540 U.S. at 426, the risk of departmental discipline and civil liability exerts a further deterrent effect on police officers. This Court has repeatedly recognized that the prospect of "internal discipline, which can limit successful careers," serves to deter officers from violating suspects' constitutional rights. *Hudson*, 547 U.S. at 598-599; *Scott*, 524 U.S. at 369. Similarly, the Court has found civil liability to be "an effective deterrent" even when officers may be shielded by the qualified immunity defense. *Hudson*, 547 U.S. at 598 (citing *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001)). The deterrent effect is that much stronger where, as here, qualified immunity is likely to be unavailable because, accepting petitioner's allegations, he was subject to a suspicionless stop that violated clearly established federal law under *Prouse*. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Case law confirms that the possibility of monetary recovery is far from illusory. As with the knock-and-announce suits at issue in *Hudson*, "the lower courts are allowing colorable" claims of unlawful

stops in violation of *Prouse* "to go forward, unimpeded by assertions of qualified immunity." 547 U.S. at 598.[6]

3. The costs of exclusion would be substantial

Applying the exclusionary rule "detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Scott*, 524 U.S. at 364; see *Hudson*, 547 U.S. at 595 (rule's "considerable" costs include "the risk of releasing dangerous criminals into society," a "grave adverse consequence that exclusion of relevant incriminating evidence always entails"); *Leon*, 468 U.S. at 907-908 (the fact that "some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains" could "generate disrespect for the law and administration of justice" (brackets and citation omitted)). Petitioner acknowledges (Br. 45) that such costs would follow from applying the exclusionary remedy to the DMV records at issue in this case. According to petitioner, however, "costs beyond those endemic to the operation of the rule itself" are what really matter. Br. 46. Petitioner then offers two principal reasons (Br. 47-51) why the latter category of costs supports application of the exclusionary rule in the present context: (a) suppressing the DMV records would not result in a continuing violation of law, and (b) applying the rule to DMV records would not generate suppression litiga-

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[6] See, *e.g.*, *Carmichael* v. *Village of Palative*, 605 F.3d 451, 456-459 (7th Cir. 2010); *Bingham* v. *City of Manhattan Beach*, 341 F.3d 939, 946-948 (9th Cir. 2003), abrogated in part on other grounds by *Virginia* v. *Moore*, 553 U.S. 164 (2008); *Johnson* v. *Anhorn*, 416 F. Supp. 2d 338, 357-358 (E.D. Pa. 2006); *Lamarche* v. *Costain*, 225 F. Supp. 2d 83, 85-86 (D. Me. 2002).

tion unfamiliar to courts or difficult for them to handle.[7] But neither of those reasons demonstrates that the costs of the exclusionary remedy here are so low that they are outweighed by the marginal deterrence that suppression might supply.

a. In refusing to apply the exclusionary rule in deportation proceedings, the Court in *Lopez-Mendoza* explained that suppressing evidence in those proceedings would necessarily result in the release of persons "whose unregistered presence in this country, without more, constitutes a crime." *Id.* at 1047. The Court noted that it had "never before accepted costs of this character," *i.e.*, allowing "ongoing violations of the law," in applying the exclusionary rule. *Id.* at 1046.

Petitioner may be correct that the "unusual and significant" costs identified in *Lopez-Mendoza*, 468 U.S. at 1046, are less salient in a case, such as this one, where suppression scuttles only the "prosecution for a single-act offense." Br. 48. The legal rule that petitioner espouses, however, is not so limited. Petitioner's rule turns on the nature of the Fourth Amendment violation, not the nature of the offense being prosecuted, and it

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[7] Petitioner also contends that the costs are low here because, unlike in *Hudson*, the threat of suppression would not produce consequences that posed risks to officer safety, and because police have "many tools at their disposal" to investigate traffic offenses. Br. 51-54. The first point may be true as far as it goes, but this Court has not treated an increased risk to officer safety as a prerequisite to deeming suppression costly. Nor has the Court suggested that the availability of other means by which police might have obtained the evidence nullifies the costs of its suppression. To the contrary, as explained above (pp. 25-26, *supra*), the existence of alternate mechanisms to achieve the same law-enforcement goal indicates that police have little incentive to commit the constitutional violation, thereby reducing the deterrence value of exclusion.

does not clearly differentiate between single-act offenses and continuing ones. *E.g.*, Pet. Br. 17 ("When the police, absent reasonable suspicion or probable cause, stop an individual and acquire identity-related evidence, the traditional remedy of exclusion applies."). Indeed, defendants prosecuted for being present in the United States illegally following removal are among those most likely to seek suppression if petitioner were to prevail. See *United States* v. *Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004) ("Although the rule that identity evidence is not suppressible is not limited to § 1326 cases, its practical force is particularly great in this context."), cert. denied, 543 U.S. 1170 (2005).

Moreover, other motor-vehicle offenses detectable through a check of DMV or other government records may constitute continuing offenses, *e.g.*, owning an unregistered vehicle. Even petitioner's offense, albeit not continuing, raises similar concerns. For example, assume that the state court had granted petitioner's suppression motion and that petitioner, in the presence of police officers, then drove himself away from the courthouse in an otherwise suspicionless manner. Petitioner's proposed rule might well render the state powerless to prosecute that separate instance of unlicensed driving, because the police would not have connected petitioner to the DMV records at issue but for the previous (allegedly unlawful) stop in this case. Cf. Pet. Br. 36; but cf. *United States* v. *Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005) ("If the government were forced to drop its prosecution of [defendant], the police could simply approach him on his way out of the courtroom door and demand that he identify himself.").

b. Petitioner also downplays the additional litigation costs that excluding evidence such as that at issue here

would engender. Although petitioner asserts that courts are accustomed to applying the Fourth Amendment standards governing vehicle stops (Br. 50), petitioner overlooks that the issue is typically litigated when serious criminal charges result from the discovery of other evidence (such as contraband) during the allegedly unlawful stop. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 809 (1996) (crack cocaine); *Prouse*, 440 U.S. at 650-651 (marijuana). Putting preexisting government records in play would give defendants facing a wider array of charges a strong incentive to litigate the legality of the stop. See *Hudson*, 547 U.S. at 595 ("The cost of entering this lottery would be small, but the jackpot enormous: suppression."). Although the end result would not necessarily be more complicated suppression hearings, it would certainly mean more of them.

The potential exclusion of preexisting government records could also create another set of increased litigation costs in cases involving fingerprints. The few federal courts of appeals that have applied the exclusionary rule to identity-related or -derived evidence—*i.e.*, fingerprints or alien immigration files in Section 1326 prosecutions—have done so when the fingerprints are taken for the purpose (at least in part) of tying the suspect to criminal conduct, rather than as part of a routine booking procedure. See *United States* v. *Oscar-Torres*, 507 F.3d 224, 230-232 (4th Cir. 2007); *United States* v. *Olivares-Rangel*, 458 F.3d 1104, 1112-1116, 1119-1121 (10th Cir. 2006); *United States* v. *Guevara-Martinez*, 262 F.3d 751, 755-756 (8th Cir. 2001). Such focus on the purpose or motives of the investigating officers imposes additional costs by forcing parties at suppression hearings to present, and trial courts to make findings based

on, evidence related to that issue. See *Oscar-Torres*, 507 F.3d at 232 (remanding for district court to determine whether, "in obtaining the fingerprints (and attendant records), law enforcement officers were motivated by an investigative purpose"); *Olivares-Rangel*, 458 F.3d at 1116, 1121 (similar). Those added litigation burdens, along with the "substantial social costs" that the Court has long recognized, outweigh "any marginal deterrence" that excluding evidence of the type at issue would provide. *Herring*, 129 S. Ct. at 700, 704 (citation omitted).

1. This case does not present the issue of flagrant police conduct

Petitioner contends (Br. 43-44) that the New York Court of Appeals erred in adopting a rule under which the exclusionary remedy is not available even on proof that police officers deliberately violated the Fourth Amendment to obtain the disputed evidence. Petitioner suggests that such a rule is at odds with this Court's focus "on the culpability of the police actions that are potentially subject to the exclusionary rule." Br. 41 (citing *Herring*, 129 S. Ct. at 701). That objection is misplaced.

In some contexts, the culpability of the police in violating the Fourth Amendment plays a crucial role—when the absence of culpability means that the exclusionary rule's deterrent purpose would be served little if at all. Cases involving the good-faith exception to the exclusionary rule, cited by petitioner (Br. 41-43), were all decided in that context. Because the doctrinal test in that context turns on whether the officer has acted in "good faith," construed as "objectively reasonable reliance," courts necessarily evaluate the flagrancy of police

conduct on a case-by-case basis. *Herring*, 129 S. Ct. at 701 (quoting *Leon*, 468 U.S. at 922 & n.23); see also *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975) (whether a confession following an unlawful arrest should be suppressed turns, *inter alia*, on "the purpose and flagrancy of the official misconduct").

But in other contexts in which the Court has found an insufficient link between the violation and the challenged evidence to warrant suppression—as is the case here—the Court has held the exclusionary rule inapplicable without regard to the flagrancy (or the inadvertence) of the constitutional violation. In *Crews*, for example, the fact that the unlawful arrest enabled police to "link together" the defendant's identity with the victim's memory was insufficient to warrant suppression. 445 U.S. at 475 (opinion of Brennan, J.). In *Harris*, the Court refused to suppress a station house statement after an in-home arrest in violation of *Payton*. Without addressing the flagrancy of the violation, the Court explained that "[t]he penalties visited upon the Government, and in turn upon the public, * * * must bear some relation to the purposes which the law is to serve." *Harris*, 495 U.S. at 17 (brackets in original) (citation omitted). Similarly, the exclusionary rule does not apply when evidence would have been inevitably discovered or has an independent source *irrespective* of bad faith on the part of police. *See Nix* v. *Williams*, 467 U.S. 431, 445 (1984) (rejecting requirement that prosecution prove "the absence of bad faith" in order to invoke inevitable-discovery exception). And the Court's opinion in *Hudson* does not suggest that exclusion would apply even to the most egregious violations of the Fourth Amendment's knock and-announce requirement. See 547 U.S. at 596-599; but cf. *id.* at 604 (Kennedy, J.,

concurring in part and concurring in the judgment) (noting concern if "widespread pattern of violations" emerged).

This case does not present any occasion for consideration of whether a pattern of "widespread" violations or "egregious violations," *Lopez Mendoza*, 468 U.S. at 1050-1051 (opinion of O'Connor, J.), might warrant an exception to the general principles that preclude suppression in this case. Nothing in the record suggests that Fourth Amendment violations of the type alleged here are widespread. As noted in the opinion below (J.A. 98a), the police officers stopped petitioner because he was playing music too loudly while driving. Petitioner averred in the trial court that he was driving lawfully and that he "was not playing his radio at an unlawfully high volume." J.A. 34a (emphasis omitted). But petitioner did not allege any facts that would suggest a flagrant violation of constitutional rights. To the contrary, the DMV records check run by the officers in this case is a routine procedure in traffic stops designed to promote both officer safety and roadway safety. See Resp. Br. 15. Even assuming a constitutional violation, therefore, nothing suggests that it was egregious.

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted.

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No. 09-11556

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

vs.

NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the exclusionary rule applies to preexisting government records obtained after an allegedly unlawful traffic stop, where the only link between the two is that the police learned the petitioner's identity as a result of the stop?

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The petitioner in this case seeks to suppress evidence that was already in the government's possession

1. The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

before the challenged stop. Suppression in this context would serve to give criminals a free pass from past criminal transgressions, while adding little to the exclusionary rule's primary purpose of deterrence. This unnecessary expansion of the rule is contrary to the interests of justice CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On the evening of New Year's Day in 2005, New York City police stopped a car for playing music too loudly. *People* v. *Tolentino*, 14 N. Y. 3d 382, 383, 926 N. E. 2d 1212, 1213 (2010). Jose Tolentino was the driver. *Ibid.* After the police learned Tolentino's name, they discovered through a Department of Motor Vehicles (DMV) records check that his driver's license was suspended and that he had at least 10 suspensions from at least 10 different dates. *Ibid.* Tolentino was arrested and charged with aggravated unlicensed operation of a motor vehicle in the first degree. *Ibid.*

Prior to trial, Tolentino moved to suppress his driving record and any statements made after his arrest, arguing the traffic stop was illegal and so the record and statements, elicited as a result of the traffic stop, were "suppressible fruit of a Fourth Amendment violation." *Id.*, at 384, 926 N. E. 2d, at 1213-1214. See also *infra*, at 8. The trial court denied the motion to suppress without an evidentiary hearing on the grounds that he did not possess a legitimate expectation of privacy in the DMV records and that such records do not constitute suppressible fruits. J. A. 78a. Tolentino pleaded guilty to the crime as charged. *Ibid.* New York law permitted him to appeal the suppression ruling despite the plea, see Brief for Respondent 5, n. 3, and the appellate court affirmed. *People* v. *Tolentino*, 59 App. Div. 3d 298, 873 N. Y. S. 2d 602 (2009).

The New York Court of Appeals granted Tolentino permission to appeal and affirmed. *Tolentino*, 14 N. Y. 3d, at 384, 926 N. E. 2d, at 1214. The court held that under the United States Supreme Court case of *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984), and several federal circuit cases, Tolentino's DMV records were "not suppressible as the fruit of the purportedly illegal stop." *Tolentino*, 14 N. Y. 3d, at 384-386, 926 N. E. 2d, at 1214-1215. The court also noted that the DMV records were already in the government's possession, citing *United States* v. *Crews*, 445 U. S. 463, 475-477 (1980), for the principle that "[t]he exclusionary rule enjoins the Government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." *Id.*, at 386, 926 N. E. 2d, at 1215.

The court went on to find that the purpose of the exclusionary rule would not be achieved by suppressing the identity evidence at issue because the social costs of suppression were great and the deterrence benefits minimal. *Tolentino*, 14 N. Y. 3d, at 386-387, 926 N. E. 2d, at 1216. Even if such evidence were subject to suppression, the court reasoned, because the government could start over and proceed with admissible identity evidence, the result of suppression would "be merely to postpone a criminal proceeding." *Id.*, at 387, 926 N. E. 2d, at 1216 (quoting *United States* v. *Farias-Gonzalez*, 556 F. 3d 1181, 1189 (CA11 2009)). The court also distinguished the identity evidence at issue from fingerprint evidence in cases where the prints were not previously in the government's possession and were used to link the defendant to the crime scene. *Id.*, at 387-388, 926 N. E. 2d, at 1216 (distinguishing *Davis* v. *Mississippi*, 394 U. S. 721, 724 (1969) and *Hayes* v. *Florida*, 470 U. S. 811 (1985)).

Neither the New York Court of Appeals nor any lower court adjudicated the lawfulness of the initial traffic stop.

This Court granted certiorari on November 15, 2010.

SUMMARY OF ARGUMENT

The exclusionary rule serves to suppress only the "products" of police wrongdoing. A person's identity, records already in the government's possession, and the linkage of a particular person to his or her records are not products of police wrongdoing and therefore not within the purview of the rule.

Independent from a "products" analysis, the constitutional limits on vehicle stops seek to protect a driver's liberty and limited privacy interests. Notably absent from these interests is a driver's interest in anonymity. Given the heavily regulated nature of motor vehicles, a person engaged in driving a vehicle on a public street has no reasonable expectation of anonymity.

The exclusionary rule should not be applied where the costs of suppression outweigh the benefits of deterring police misconduct. The availability of suppression for identity and government records would hinder society's compelling interests in fighting crime and bringing offenders to justice. Other well-established bases for suppression and civil liability already provide police with a significant incentive to follow the law, and extension of the exclusionary rule to these types of evidence would add little additional benefit.

Application of the exclusionary rule is inappropriate in this case, and the New York Court of Appeals was correct in so holding.

ARGUMENT

1. The defendant's identity and DMV records are not the "products" of any police wrongdoing and therefore not subject to exclusion.

A. Crews and Linkage.

It is well established that "the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to [an] underlying illegality."[2] *New York* v. *Harris*, 495 U. S. 14, 19 (1990). However, it is also "clear that the cases implementing the exclusionary rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.'" *Nix* v. *Williams*, 467 U. S. 431, 444 (1984) (quoting *United States* v. *Crews*, 445 U. S. 463, 471 (1980)) (emphasis added in *Nix*). This Court has emphasized that the product inquiry is an important "threshold matter" to be determined before analyzing the proximity between the illegality and contested evidence. See *Harris*, *supra*, at 19.

Turning to the case here, it is helpful at this point to parse out the "evidentiary" items at issue. They consist of Tolentino's identity, his DMV records, the link between the two, his presence at trial (if there had been a trial), and the police officer's identification of him as the driver of the car.

Tolentino's presence is not suppressible, even if produced by an illegal arrest. This argument was ex-

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2. Tolentino repeatedly characterizes the traffic stop here as illegal, and claims the New York courts "presumed" the same. See, *e.g.*, Brief for Petitioner 17, 29, 43, 54. No court below made such a finding, however. By deciding the case on the legal issue rather than the factual one, the trial court avoided the need for an evidentiary hearing.

pressly rejected by this Court in *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1039-1040 (1984), *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). Tolentino concedes as much in his brief. Brief for Petitioner 26.

Tolentino's DMV records also fall outside the scope of the exclusionary rule because they are not a product of any alleged police wrongdoing. They were not "discovered" as a result of police exploitation, because they were already in the government's possession. Though Tolentino claims they were not " 'in official hands' in any meaningful sense," Brief for Petitioner 35, they are indeed a government record, entirely within official control and possession.

The more probative "evidence" that Tolentino has an interest in excluding is the *link* made by the arresting officer between Tolentino's physical person and his DMV records. This link is what would give the records, in Tolentino's words, a "meaningful sense." But before delving into the threshold "product" inquiry, a significant question remains whether this "linking evidence" constitutes an evidentiary item at all—an issue presented to this Court in *United States* v. *Crews*.

Crews, like the present case, concerned linkage between the defendant and evidence already known to the government before the challenged seizure: the robbery victim's memory of the face of the perpetrator. See 445 U. S., at 465, 471. Justice Brennan, joined only by Justice Stewart and Justice Stevens on this issue, left open the linkage question. Under the particular facts in *Crews*, Justice Brennan reasoned that, because police already knew the defendant's identity and had some preexisting suspicion linking him to the crime, "the Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp." *Id.*, at 475 (footnote omitted).

Justice Powell, joined by Justice Blackmun, joined Justice Brennan's opinion, making it the opinion of the Court, except with respect to the issue just described. On this point, Justice Powell explained he would "reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest," as foreclosed by those cases holding a defendant may be brought to court notwithstanding an illegal arrest. *Crews*, 445 U. S., at 477 (Powell, J., concurring in part) (citing *Frisbie* v. *Collins*, 342 U. S. 519 (1952) and *Ker* v. *Illinois*, 119 U. S. 436 (1886)).

Similarly, Justice White, joined by the Chief Justice and Justice Rehnquist, concurring in the result, opined that *Frisbie* was binding on the suppressibility of a defendant's face. *Crews*, 445 U. S., at 478 (White, J., concurring in result). Justice White hypothesized:

> "Assume that a person is arrested for crime X and that answers to questions put to him without *Miranda* warnings implicate him in crime Y for which he is later tried. The victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not suppress such an identification on the grounds that the police had no reason to suspect the defendant of crime Y prior to their illegal questioning and that it is only because of that questioning that he is present in the courtroom for trial." *Id.*, at 478-479.

Justice White added as a final remark that "a majority of the Court agrees that the rationale of *Frisbie* forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest." *Id.*, at 479.

Justice White's hypothetical is on point here. Tolentino was stopped for crime X, playing his music too loudly. The records check implicated him in crime Y, driving with a suspended license. It is only because

of investigatory methods undertaken during the challenged stop[3] that Tolentino was implicated and charged with crime Y. But a majority of this Court found in *Crews* that such a link was not suppressible in a closely analogous situation.

In some circumstances, a police officer's testimony about what he observed during a stop could be a suppressible "fruit." The lineup evidence in *Crews* was considered a product of the illegal arrest, see 445 U. S., at 468, and similarly a police officer's observation during a stop would be a product of the stop. However, the officer's observation of the driver before the stop is not a product and not subject to suppression. See *California* v. *Hodari D.*, 499 U. S. 621, 629 (1991) (evidence abandoned prior to seizure is not "fruit"). In the present case, although defendant initially included "post-seizure observations" in his suppression motion, J. A. 17a, the case was subsequently litigated solely on the DMV records and defendant's statements. See J. A. 78a (trial court); J. A. 96a (initial appeal); J. A. 99a (Court of Appeals).

B. Fingerprint Analogies.

Tolentino points to this Court's decisions in *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and *Hayes* v. *Florida*, 470 U. S. 811 (1985), holding that identity evidence, such as fingerprints, is subject to suppression if unlawfully obtained. See Brief for Petitioner 24-25. However, the evidence in this case is distinguishable from the fingerprints in those cases.

In the two cases just cited, fingerprint evidence was generated during unlawful detentions and used to link

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3. The lawfulness of the initial stop remains unresolved. See *supra*, footnote 2.

the defendants to unsolved crimes. *Davis*, 394 U. S., at 722-723, 725; *Hayes*, 470 U. S., at 812-814. The fingerprint evidence linking the defendants did not exist prior to their arrests. Though both men obviously had fingerprints in the physical sense, the transposition of the prints in a form suitable for analysis was entirely " 'come at by exploitation of' " their illegal detentions. See *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963) (quoting Maguire, Evidence of Guilt 221 (1959)). This Court in *Davis* found the generated fingerprint evidence to be legally indistinguishable from statements or physical items, both recognized suppressible categories of evidence:

> " 'Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.' " *Davis*, 394 U. S., at 724 (quoting *Bynum* v. *United States*, 262 F. 2d 465, 467 (DC Cir. 1958)).

The DMV records in this case are more closely analogous to the fingerprint evidence introduced on retrial in *Bynum* v. *United States*, 274 F. 2d 767 (CADC 1960) (*per curiam*), cited with approval by Justice Brennan in *Crews*. Following suppression of the fingerprints taken during the unlawful arrest, Bynum was reindicted and retried using an older set of prints that had been in the government's possession all along. These prints were admissible. See *Crews*, 445 U. S., at 476 (opinion of Brennan, J.).

The DMV records, like the earlier prints of Bynum, is not a product of the stop. The only "product," in the most technical meaning of the term, is the ability to

link the particular person to his or her records, which, as discussed above, is not an item of evidentiary value at all. Thus *Davis* and *Hayes* are not dispositive.

Also inapposite are the substantive "stop and identify" cases, such as *Brown* v. *Texas*, 443 U. S. 47 (1979). See *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 183-185 (2004) (summarizing cases). These are not exclusionary rule cases at all but rather cases involving substantive guilt of an offense. In *Brown*, lawfulness of the stop was an element of the offense, see 443 U. S., at 49, n. 1, and the Court was effectively reviewing the trial court's holding on that element. See *id.*, at 50. Brown's conviction was reversed because he was innocent of any offense, not because evidence of his guilt was inadmissible. See *id.*, at 53.

Citing *Brown*, petitioner contends it would be anomalous for the law to forbid a stop without reasonable suspicion and yet allow prosecution for a crime that would not have been discovered without the stop. See Brief for Petitioner 19-20. Yet the abduction cases of *Ker*, *Frisbie*, and *United States* v. *Alvarez-Machain*, 504 U. S. 655 (1992), illustrate that an illegal act in the course of bringing a defendant to trial does not universally result in an exemption from prosecution. The exclusionary rule requires only suppression of a particular item of evidence obtained through an illegal search or seizure.

No item of evidence that would have been introduced at a trial and that was at issue before the New York Court of Appeals was the product of the challenged stop. The DMV records are not a product because the government had them before the stop. The defendant's identity is not evidence. The link between the two is also not evidence. Suppression of the records was correctly denied.

II. Driver identification evidence should not be suppressible under the exclusionary rule because the rule against illegal traffic stops does not seek to protect the identity of a driver on a public road.

There is a second and independently sufficient reason to deny suppression in this case. Identity of a driver, and the link to a preexisting record provided by identity, are not subject to suppression because the constitutional limits on traffic stops do not seek to protect a driver's anonymity.

A. The Exclusionary Rule's "Bear Some Relation" Requirement.

The "fruit of the poisonous tree" doctrine does not stand as an impenetrable barrier between a Fourth Amendment violation and admissible evidence. To the contrary, suppression "has always been our last resort, not our first impulse." *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006). Even in those instances where there is direct causation between the police illegality and the discovered evidence, this Court has long "eschewed any *per se* or 'but for' rule." See *Dunaway* v. *New York*, 442 U. S. 200, 217 (1979) (quoting *Brown* v. *Illinois*, 422 U. S. 590, 600 (1975)).

Application of the exclusionary rule is limited in scope, with an important focus on the purpose of the rule. In other words, "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *United States* v. *Ceccolini*, 435 U. S. 268, 279 (1978). This Court has therefore declined to extend the exclusionary rule to those situations where the constitutional rule violated by the police was not intended to protect the defendant's interest at issue.

Several cases illustrate this principle. In *New York* v. *Harris*, 495 U. S. 14, 21 (1990), this Court refused to apply the exclusionary rule to a defendant's station-house confession obtained after an illegal arrest. In that case, police had probable cause to arrest Harris, but they did so in Harris's home without an arrest warrant in violation of the rule announced in *Payton* v. *New York*, 445 U. S. 573, 590 (1980). *Harris*, *supra*, at 16. However, the purpose of the *Payton* rule is to "dr[aw] a line at the entrance to the home" and to " 'interpose the magistrate's determination of probable cause' to arrest before the officers could enter a house to effect an arrest." *Id.*, at 18 (quoting *Payton*). The evidence Harris sought to have suppressed—a confession made at the police station after the arrest—did not fall within the sphere of interests sought to be protected by the constitutional rule violated. Thus, it was not appropriate to apply the exclusionary rule to the confession. *Id.*, at 17.

Similarly, in *Hudson* v. *Michigan*, this Court determined the exclusionary rule does not serve to suppress evidence discovered after a violation of the knock-and-announce rule. The purpose of the common law rule is the protection of human safety, property, and privacy interests threatened by an unannounced entry. 547 U. S., at 594. The evidence sought to be suppressed—evidence seized pursuant to a search warrant—fell outside this protection. *Ibid.* As a result, notwithstanding an unannounced police entry, subsequently discovered evidence was not suppressible under the exclusionary rule. "Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Ibid.*

In sum, applicability of the exclusionary rule requires two threshold inquiries. First, the constitutional

rule allegedly violated by police is analyzed to discern what interests it seeks to protect. Second, it must be determined whether the item of evidence sought to be suppressed falls within that category of protected interests. If the answer to the second inquiry is no, the evidence should not be suppressed because the basic purpose of the exclusionary rule would not be served.

Here, the interests protected by the rule against unjustified traffic stops do not include any right to driver anonymity. Identity evidence, even if come to by police wrongdoing, should not be suppressible under the exclusionary rule.

B. The Rule Against Illegal Traffic Stops.

A traffic stop is a recognized seizure and subject to the constraints of the Fourth Amendment. See *Whren* v. *United States*, 517 U. S. 806, 809-810 (1996); *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556 (1976). Generally speaking, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.' " *Prouse*, *supra*, at 653-654 (quoting *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978)) (internal footnotes omitted).

It should be noted at the outset that the expectation of privacy in the context of vehicles is reduced. For example, the Fourth Amendment's warrant requirements are significantly more flexible with respect to vehicles both because of their "ready mobility" and the "pervasive regulation of vehicles capable of traveling on the public highways." *California* v. *Carney*, 471 U. S. 386, 390-392 (1985). These less strict standards apply even to containers within the vehicle, *California* v.

Acevedo, 500 U. S. 565, 479-581 (1991), including those belonging to passengers, *Wyoming* v. *Houghton*, 526 U. S. 295, 303 (1999), because a vehicle "seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion).

All protection is not lost, however. "[P]eople are not shorn of all Fourth Amendment protection . . . when they step from the sidewalks into their automobiles." *Prouse*, 440 U. S., at 663. Liberty and privacy interests of drivers are threatened by unlawful or arbitrary traffic stops. Specifically, traffic stops "interfere with freedom of movement, are inconvenient,[] consume time," and "may create substantial anxiety." *Id.*, at 657. Drivers also maintain some expectation of privacy, albeit lessened, in their vehicles. As this Court has noted, "[u]ndoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel." *Id.*, at 662. A rule mandating a minimum standard of reasonable suspicion to effect a traffic stop is generally required, therefore, to protect these interests. Cf. *Brendlin* v. *California*, 551 U. S. 249, 263, n. 7 (2007) (noting cases for the principle that police must have reasonable suspicion or probable cause to conduct a lawful traffic stop).

C. Identification Evidence.

Having outlined the scope of the protection against unlawful traffic stops, the discussion should now turn to the evidence sought to be suppressed, *i. e.*, petitioner's identity linking him to the DMV driving records.[4]

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4 As discussed above, however, there is a significant question as to whether the "linking evidence" Tolentino seeks to suppress is an item of evidentiary value at all. See Part I, *supra*.

This Court has already intimated that a person does not have a protectable interest in his or her identity. In *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1039 (1984), this Court stated, "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest . . . ."[5] A defendant's presence is also not a "suppressible 'fruit.' " *United States* v. *Crews*, 445 U. S. 463, 474 (1980).

In the context of drivers, the privacy interest in identity of one on a public roadway is minimal, at best. There are numerous vehicle regulations a driver must follow that render identity available to government officials, including those pertaining to information gleaned from the vehicle's exterior. Relevant to the circumstances here, for instance, the New York Vehicle and Traffic Law requires an owner of a motor vehicle to submit his or her name and residence in order to register the vehicle, N. Y. Veh. & Traf. Law § 401(1)(b)(c), an operator of a vehicle to "furnish to [any] magistrate, inspector, peace office or police officer . . . all information required concerning his license to operate," N. Y. Veh. & Traf. Law § 401(4), and that a distinctive license plate corresponding to a certificate of registration be kept "clean and in a condition so as to be easily readable," N. Y. Veh. & Traf. Law § 402(1)(a), (b) (which will naturally correspond to the registered owner).

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5. *Amicus* acknowledges that the scope of this sentence is the crux of the instant case, and that several courts have interpreted the language as merely a jurisdictional statement rather than evidence exempted from the exclusionary rule. However several federal circuits have noted this Court's "exceptionally broad statement, using the rarely employed word 'never' " conveying that identity is indeed not a protectable interest. See *United States* v. *Bowley*, 435 F. 3d 426, 430 (CA3 2006) (quoting *United States* v. *Del Toro Gudino*, 376 F. 3d 997, 1000-1001 (CA9 2004)).

While there is a distinction between the owner of a vehicle and the driver of a vehicle at a particular time, this information usually limits the universe of potential drivers to either the registered owner or someone granted permission to drive by the registered owner. Furnishing information about one's identity is therefore a *requirement* of exercising the privilege of driving, and simply getting behind the wheel and entering a roadway releases this information.

The physical characteristics of a person in the driver's seat on a public road are also inherently public. Given the transparency of the windshield and the front side windows of a vehicle, a driver's appearance is plainly visible to those outside. In fact, it is not uncommon for state law to limit the permissible tinting of the windshield and front side windows, thereby *prohibiting* obstructed views of the driver. See, *e.g.*, N. Y. Veh. & Traf. Law § 375(12-a)(b)(1-2) (requiring the windshield and front windows to be composed of material with a light transmittance of no less than 70 percent), Cal. Veh. Code § 26708(d)(2) (requiring the side windows to have a minimum light transmittance of 70 percent); Va. Code Ann. § 46.2-1052(C)(2) (requiring the side windows to have minimum light transmittance of 50 percent). Notably, these limitations are generally more restrictive with respect to the *front* windows, surrounding the driver, as opposed to the side windows for the back seat, see Cal. Veh. Code § 26708(b)(4) (limitations do not apply to "[s]ide windows that are to the rear of the driver"); Va. Code Ann. § 46.2-1052(C)(1) (greater light restrictions permitted for the back side windows than front side windows), and so the privacy interests in the front part of the vehicle are even less than those in the back.

Simply put, a driver has no reasonable expectation of anonymity. Even if there were a *de minimis* interest

in anonymity, it certainly does not fall within the interests protected by the constitutional limits on traffic stops. The discovery of a driver's name has no effect on the driver's liberty. Cf. *Prouse*, 440 U. S., at 657. Nor would it interfere with the limited privacy interests a driver maintains in his or her vehicle. See *Carney*, 471 U. S., at 390-392. Because the interests protected by the rule against suspicionless traffic stops have no bearing on a driver's identity, suppression would not vindicate rights of the driver violated by the unlawful stop.

Petitioner accurately states that a suspicionless vehicle stop for the sole purpose of checking a driver's identification is unreasonable under the Fourth Amendment, see Brief for Petitioner 18-19, and that any argument to the contrary was foreclosed by *Prouse*, *supra*. In that case, this Court balanced the state's interest in ensuring that only qualified drivers and safe vehicles inhabited the roads with a driver's liberty and limited privacy interests. 440 U. S., at 658-661. The Court concluded the "marginal contribution to roadway safety possibly resulting from a system of spot checks" did not justify random traffic stops to check for compliance with the state's vehicle laws. *Id.*, at 661-663. But while the specific investigatory method at issue there involved ascertaining a driver's identity, the Court's decision did not turn on the existence of any interest in identity. Rather, the interests considered in the weighing process were the driver's freedom of movement, possible anxiety resulting from a suspicionless stop, and concerns of time and convenience. See *id.*, at 657. Any interest in *identity* was simply not part of the equation.

Moreover, the occurrence of a Fourth Amendment violation does not automatically trigger application of the exclusionary rule, as discussed *supra* and consistently confirmed by this Court. See, *e.g.*, *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006); *Dunaway* v. *New*

York, 442 U. S. 200, 217 (1979); *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). The issue here is application of the exclusionary rule upon a finding of a constitutional violation. Because application of the rule to these circumstances would not vindicate any interests violated by an illegal traffic stop, exclusion should not apply and the New York Court of Appeals was correct in so holding.

III. The costs of applying the exclusionary rule to identity evidence outweighs the benefits.

"[T]he application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought to be most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). "[T]he exclusionary rule is not an individual right and applies only where it '"result[s] in appreciable deterrence,"'" *Herring* v. *United States*, 555 U. S. 135, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496, 504 (2009) (quoting *United States* v. *Leon*, 468 U. S. 897, 909 (1984)). After balancing the costs and benefits of applying the rule, this Court has declined to extend the rule in a variety of contexts. See, *e.g.*, *Herring*, 129 S. Ct., at 703, 172 L. Ed. 2d, at 508 ("evidence . . . obtained in objectively reasonable reliance on a subsequently recalled warrant"); *Illinois* v. *Krull*, 480 U. S. 340, 352-353 (1987) (evidence discovered pursuant to a statute, presumptively valid at the time but later pronounced unconstitutional); *Leon*, *supra*, at 922 (evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant); *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1050 (1984) (civil deportation proceedings); *Calandra*, *supra*, at 354-355 (grand jury proceedings); *Walder* v. *United States*, 347 U. S. 62, 65 (1954) (impeachment of a defendant).

Exclusion of a suspect's identity would significantly hinder the prosecution of crime by giving individuals, such as Tolentino, a free pass to avoid their past criminal transgressions. And because suppression of a suspect's identity will not add to the deterrence of wrongful police work, the costs of applying the exclusionary rule to the circumstances here far outweigh the benefits.

A. Costs.

The costs to effective law enforcement here are significant. Indeed, this Court has recognized "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986); see also *United States* v. *Hensley*, 469 U. S. 221, 229 (1985) (recognizing the "strong government interest in solving crimes and bringing offenders to justice"). The strength of this interest is also confirmed in cases outlining the applicability of the exclusionary rule, where the "drastic and socially costly" nature of evidence suppression has been recognized. See, *e.g.*, *Nix* v. *Williams*, 467 U. S. 431, 442 (1984).

Suppression of a suspect's identity and, likewise, records learned of from that identity, pose a serious threat to law enforcement efforts. A graver set of facts than the ones in this case can easily be imagined: police effect a traffic stop on less than reasonable suspicion or probable cause. As is customary during traffic stops, the officer asks for the driver's identification and may run a check for outstanding warrants. The officer learns that the driver has several outstanding warrants for serious felonies. If Tolentino's argument is accepted and suppression applicable, the driver's identity and the resulting warrants would be inadmissible as a result of the triggering illegal traffic stop. "It would be startling to suggest that because the police illegally stopped an

automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" *United States* v. *Green*, 111 F. 3d 515, 521 (CA7 1997). Such suppression would have a significant and deleterious effect on criminal investigations, as it would essentially require a police officer to turn a blind eye to a suspect found with outstanding warrants. This type of free pass directly contradicts society's "compelling interest" in holding offenders accountable for their actions.

Several courts have attempted to deal with this issue by analyzing the discovered warrants under the "intervening circumstances" doctrine. See, *e.g.*, *United States* v. *Gross*, 624 F. 3d 309, 319-322 (CA6 2010); *United States* v. *Green*, 111 F. 3d, at 521-522; *State* v. *Frierson*, 926 So. 2d 1139, 1144-1145 (Fla. 2006). The shortfall of this analysis, however, is that an officer's bad faith and intent in effecting the stop threaten to play a role. See, *e.g.*, *Gross*, *supra*, at 325-328 (Gibbons, J., concurring in part and dissenting in part); *Green*, *supra*, at 523; *Frierson*, *supra*, at 1144-1145. A rule that this type of evidence is beyond the reach of the exclusionary rule altogether is more in accord with this Court's Fourth Amendment jurisprudence. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." See *Whren* v. *United States*, 517 U. S. 807, 813 (1996).

B. Benefits.

Conversely, the potential benefits here are minimal. Despite some language in older cases stating other rationales, the exclusionary rule is justified in modern cases solely as a deterrent to police misconduct. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Davis* v. *United States*, No. 09-11328, p. 7. "The core rationale consistently advanced by this Court

for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix* v. *Williams*, 467 U. S. 431, 442-43 (1984). But this Court has made clear "it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment,'" *United States* v. *Leon*, 468 U. S. 897, 910 (1984) (quoting *Alderman* v. *United States*, 394 U. S. 165, 174 (1969)), and thus the exclusionary rule should not be extended further than necessary if deterrence can be achieved by limited suppression. See, *e.g.*, *New York* v. *Harris*, 495 U. S. 14, 20-21 (1990) (declining to suppress a stationhouse confession after a *Payton* violation when exclusion of evidence gathered from the illegal in-home arrest would vindicate the purpose of the rule).

Some courts have reasoned, and Tolentino warns, Brief for Petitioner 29, 40, that if suppression is not available for information obtained during an unlawful traffic stop, such as a driver's outstanding warrants discovered from the driver's name, police will have an incentive to violate the law. See, *e.g.*, *Gross*, 624 F. 3d, at 320-321. This argument fails, however, because "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson* v. *Michigan*, 547 U. S., at 596. Nearly all other evidence obtained during an illegal stop will fall subject to the exclusionary rule, and any additional deterrence gained from suppressing a driver's identity is minimal.

In the more typical traffic stop/evidence suppression scenario, an unlawful traffic stop results in the discovery inside the vehicle of evidence that must be suppressed. See, *e.g.*, *Delaware* v. *Prouse*, 440 U. S. 648,

650 (1979) (marijuana discovered on vehicle floor during illegal stop); *United States* v. *Urrieta*, 520 F. 3d 569, 572 (CA6 2008) (firearms and fraudulent identification cards discovered in vehicle during unlawful extension of traffic stop). *United States* v. *Lopez-Soto*, 205 F. 3d 1101, 1103 (CA9 2000) (400 kilograms of marijuana discovered in car and trunk during unlawful traffic stop). It would make little sense to argue a driver's expectation of privacy—albeit, a lessened one—does not include these items, and the exclusionary rule would naturally apply to suppress these items as fruits, come at by exploitation of police illegality. See *Wong Sun* v. *United States*, 371 U. S. 471, 487-488 (1963).

The mere fact of a driver's name, in most cases, would be useless to a police officer. It would be irresponsible investigatory work for an officer to effect a questionable traffic stop and run the risk of discovering significant, but inadmissible evidence, simply to learn the driver's name. The assumption that police officers would turn to "a new form of police investigation" of conducting a suspicionless stop for this purpose, see *Gross*, 624 F. 3d, at 320-321, is an argument for a "speculative and undoubtedly minimal advance in the deterrence of police misconduct" that this Court should "decline to embrace." See *Calandra*, 414 U. S., at 351-352.

If police did turn to such an improper investigatory method, other sources of punishment would befall them. A pattern of illegal stops would leave local governments subject to civil liability and accompanying attorney's fees, without the shield of qualified immunity. See *Los Angeles County* v. *Humphries*, 562 U. S. __, 131 S. Ct. 447, 452 (2010) (noting breadth of "policy or custom"). Individual officers conducting suspicionless traffic stops could face internal disciplinary action, which certainly has a deterrent effect given its threat to

"limit successful careers." See *Hudson*, 547 U. S., at 599. They would also be subject to personal civil liability, given that *Prouse* is clearly established law. It would be in the officer's interest and that of the respective employing agency to comply with traffic stop limitations.

The balancing of these interests demonstrates that "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." See *Hudson*, 547 U. S., at 599. Identification evidence, as well as preexisting government records accessed with identification evidence, should join those items this Court has already recognized as beyond the scope of suppression.

CONCLUSION

The decision of the Court of Appeals of New York should be affirmed.

February, 2011

Respectfully submitted,

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JOSE TOLENTINO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On a Writ of Certiorari to
The New York Court of Appeals

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONER

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DeVere v. Attorney General, 146 N.H. 762 (N.H. 2001) 29

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Locate.Plus.Com, Inc. v. Iowa Dept. of Transp., 650 N.W.2d 609 (Iowa 2002) 29

McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005) 31

Myerson v. Prime Realty Services, LLC 796 N.Y.S.2d 848 (2005) 29

O'Brien v. Quad Six, Inc., 219 F.Supp.2d 933 (N.D. Ill. 2002) 29

Reno v. Condon, 528 U.S. 141 (2000) 27, 28

Russell v. Choicepoint, 302 F. Supp. 2d 654 (E.D. La. 2004) 29

Taylor v. Acxiom Corp., 612 F 3d 325 (5th Cir. 2010) 30

Young v. West Pub. Corp., 724 F.Supp.2d 1268 (S.D. Fl. 2010) 30

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18 U.S.C. § 18 U.S.C. 2721(b) 27
18 U.S.C. § 2721 27
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5 U.S.C. § 552a 21, 22
5 U.S.C. § 552a(e)(1) 22
5 U.S.C. § 552a(e)(5) 22
8 U.S.C. § 1357(g) 13

OTHER AUTHORITIES

BJS, *Improving Access to and Integrity of Criminal History Records*, NCJ 200581 (July 2005) 19

Bob Sullivan, *ChoicePoint Files Found Riddled With Errors*, MSNBC, Mar. 8, 2005 26

Bob Sullivan, *Red Tape Chronicles: Bob the Writer, Bob the Molester*, MSNBC, May 3, 2006 26

Brief of Amicus Curiae Electronic Privacy Information Center at 1, *Reno v. Condon*, 528 U.S. 141 (2000) 28

Bureau of Justice Statistics, *Improving Criminal History Records for Background Checks* (May 2003) 21

Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update, NCJ 187670 at 38 (Dec. 2001) 19

Dana Priest and William M. Arkin, *Monitoring America*, Wash. Post, Dec. 20, 2010 ..... 6, 9

Dep't of Justice, Bureau of Justice Statistics, *National Criminal History Improvement Program (NCHIP)* 21

Department of Homeland Security, *Privacy Impact Assessment for the Interim Data Sharing Model (iDSM) for the Automated Biometric Identification System (IDENT)/Integrated Autmated Fingerprint Identification System (IAFIS) Interoperability Project 2* (Sept. 1, 2006) 12

Dynamic Imaging Systems, *PositiveID® Facial Recognition & Fingerprint Identification: Mobile & Wireless Capabilities* 7

Exploring Federal Solutions to the State and Local Fugitive Crisis,\ Hearing Before the S. Subcomm. On Crime and Drugs of the Comm. of the Judiciary, 110th Cong. 2 (2010) (Statement of Roy G. Weise, Senior Advisor, Criminal Justice Information Services Division) 8

Federal Bureau of Investigation, *Five Key Services* 11

Federal Bureau of Investigation, *National Crime Information Center* 8, 9

Federal Bureau of Investigation, *NCIC Code Manual: Personal Descriptors*, Mar. 3, 2010 ... 9, 10

Global Justice Info. Sharing Initiative, Dep't of Justice, Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era -- Guidelines for Establishing and Operating Fusion Centers at the Local, State, and Federal Levels – Law Enforcement Intelligence, Public Safety and the Private Sector 2 (Aug. 2006) 14, 15

Gov. Donald L. Carcieri, Rhode Island Executive Order 08-01 (March 27, 2008) 13

Gov. Lincoln Chafee, Rhode Island Executive Order 11-02 (January 5, 2011) 13

Gov't Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 25 (Aug. 2005) 23

H.B. 1007, 2008 Gen. Assem., Spec. Sess. (Va. 2008) 17

Jane Black, *Data Collectors Need Surveillance, Too*, Business Week, Jan. 24, 2002 25

Kim Zetter, *Bad Data Fouls Background Checks*, Wired News, Mar. 11, 2005 25

L-1 Identity Solutions, *IBIS Extreme: How it Works* 7

L-1 Identity Solutions, *L-1 Identity Solutions, Intellimobile – Solutions* 8

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Office of Inspector Gen., Dep't of Justice, *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays*, Rept. No. I-97-08 (Sept. 1997) 23

Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File*, A-08-06-26100 (Dec. 18, 2006) 23

Philip Marcelo, *Impact of Carcieri's Immigration Order Under Scrutiny*, Providence Journal, Nov. 20, 2010 13

Press Release, U.S. Immigration and Customs Enforcement, *Secure Communities Strategy at Work in Fairfax County* (Mar. 16, 2010) 12

Samuel Alito, The Boundaries of Privacy in America (1972) 5

Solomon Moore, *F.B.I. and States Vastly Ex, pand DNA Databases*, N.Y. Times, Apr. 18, 2009 17

The Future of Fusion Centers: Potential Promise and Dangers: Hearings Before the H.Comm on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec., 111th Cong. 16 (2010) (statement of Robert Riegle, Director, State and Local Program Office, Office of Intelligence and Analysis, Dept. of Homeland Sec.) 16

Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., *Fusion Centers: Issues and Options for Congress, RL34070* 20, 19 (July 6, 2007 13

INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[2]

EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests. These cases include *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Quon v. City of Ontario*, 130 S. Ct. 2619 (2010); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and the brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC is grateful for the work of EPIC Fellows Conor Kennedy and Nichole Rustin-Paschal, who contributed to the preparation of this brief.

Stratton, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); and other federal and state cases.

EPIC has a particular interest in ensuring that individuals are able to maintain reasonable control over the disclosure of their identity, particularly when the release of this information enables access to a wide range of personal information stored across computer databases.

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SUMMARY OF THE ARGUMENT

In *Hiibel v. Sixth Judicial District*, 542 U.S. 177 (2004), this Court upheld a Nevada statute requiring individuals to state their name to a police officer because "the statute does not require a suspect to give the officer a driver's license or any other document." *Id.* at 186. This case presents the question, also in the context of a car stop with less than probable cause, whether a person should be required to present the driver's license. As the *Hiibel* minority noted, and the opinion for the Court did not dispute, a person's name is "the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases." *Id.* at 196 (Stevens, J. dissenting). The risk is real that car stops will increasingly become pretextual because of the opportunity to search a government database for data unrelated to the reason that gave rise to the original stop.

Because of the circumstances of the stop in this case, the earlier decision of the Court in *Hiibel*, and *amici's* ongoing concern about the growing use of personal data by government without a clear law enforcement purpose, *amici* urge the Court to reverse the decision below.

ARGUMENT

I. A Traffic Stop Can Give Police Access to an Enormous Pool of Personal Data

Government databases give police officers access to an extraordinary range of detailed personal information. No longer does the stop of a vehicle provide access to simple information about the status of the car. Given a few minutes, police officers can search from their squad cars an increasingly sophisticated network of government data systems, and obtain personal information once scattered across municipal, state, and federal criminal databases that would never have been available in the context of a routine car stop. This capability underscores the need to safeguard drivers' privacy interests, particularly in view of the broad consensus that rapid technological change necessitates vigilant maintenance of cherished privacy safeguards. As one of the current Justices once wrote:

> [W]e sense a great threat to privacy in modern America; we all believe that privacy is too often sacrificed to other values; we all believe that the threat to privacy is steadily and rapidly mounting; we all believe that action must be taken on many fronts now to preserve privacy.

Samuel Alito, The Boundaries of Privacy in America 1 (1972) ("Report of the Chairman") (on file with *amici*).

A. Mobile Data Terminals

Government contractors offer products for police officers to capture biometric data from their patrol

cars and match it to state and federal databases. Standard products include iris scanners,[3] hand-held, mobile fingerprint scanners[4] and facial recognition cameras,[5] all enabling officers to record and search in near-real time. In Maricopa County, Arizona, a police unit specializing in biometric collection and "using a type of equipment prevalent in war zones, records 9,000 biometric digital mug shots a month." Dana Priest and William M. Arkin, *Monitoring America*, Wash. Post, Dec. 20, 2010, at 2.[6] These same devices are interoperable with both state and national criminal databases. *See, e.g.*, L-1 Identity

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[3] *See* "Hiide Series 4," L-1 Solutions, http://www.l1id.com/pages/47-hiide-?rev=true.

[4] *See e.g.*, "IBIS Extreme," L-1 Identity Solutions, http://www.l1id.com/pages/536-ibis-extreme; Press Release, Datastrip, "Fairfax County Police Deploys Datastrip DSV2+TURBO Devices to Enhance Identification Accuracy in the Field," (Feb. 5, 2008) http://www.datastrip.com/press/Police_Deploys_Datastrip.html; "Positiveid+," Dynamic Imaging, http://www.dynamicimaging.com/positiveid/.

[5] *See e.g.* "FaceIt Argus" L-1 Identity Solutions, http://www.l1id.com/pages/71-facial-screening; Press Release, Datastrip, "Datastrip Adds Camera to DSVII Mobile Biometric ID Readers" (Sept. 25, 2006), http://www.datastrip.com/press/09.25.06%20Digital%20Still%20Camera.html; "Positiveid+," Dynamic Imaging, http://www.dynamicimaging.com/positiveid/.

[6] *Available at* http://projects.washingtonpost.com/top-secret-america/articles/monitoring-america/2/.

Solutions, *IBIS Extreme: How it Works*.[7] In such circumstances, the car stop provides an opportunity to gather further personal data about an individual regardless of whether any crime has occurred.

Officers can run fingerprint searches directly from their patrol car laptops and handhelds and conduct facial recognition searches with Blackberry, Android, or iPhone cellular phones. *See, e.g.*, Dynamic Imaging Systems, *PositiveID+ Facial Recognition & Fingerprint Identification: Mobile & Wireless Capabilities*.[8] Camera phones can be used to capture a subject's image and submit it to a matching server. *Id.* Within moments, personal data purportedly related to the individual is sent back on to the same device for retrieval and review. *Id.*

B. The National Crime Information Center

One of the largest repositories of personal information retrieved through mobile data terminals is the National Crime Information Center ("NCIC"). The NCIC is a searchable index of digital profiles. The FBI began the NCIC over fifty years ago to centralize the submission and retrieval of state criminal history records, or "rap sheets." *See Exploring Federal Solutions to the State and Local Fugitive Crisis, Hearing Before the S. Subcomm. On Crime and Drugs of the Comm. of the Judiciary*, 110th Cong. 2 (2010) (Statement of Roy G. Weise, Senior Advisor, Criminal Justice Information

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[7] http://www.11id.com/pages/533-ibis-extreme-how-it-works?rev=true.

[8] http://www.dynamicimaging.com/positiveid/features-benefits.aspx#mobile.

Services Division).[9] Since then, Congress expanded the system to include many new categories of sensitive data, including records of protection orders, missing or unidentified persons, and immigration violations. States, cities, tribal agencies, sentencing commissions, penal institutions, railroad police departments, and private university police departments can now access the NCIC database. 28 U.S.C. § 534.

The NCIC operates over a private, national telecommunications network connecting squad cars across the country with state-based operators who have direct access to the NCIC index. Federal Bureau of Investigation, *National Crime Information Center*.[10] L-1's IntelliMobile "gives officers the ability to wirelessly access data and query the National Crime Information Center as well as local and state records simultaneously in real-time without having to radio dispatch." L-1 Identity Solutions, *L-1 Identity Solutions, Intellimobile – Solutions*.[11] The NCIC profiles accumulate more personal data as federal, state, and local law enforcement agencies voluntarily gather and submit personal information from convicted individuals, criminal suspects, and other persons of interest. *See id.* The NCIC is accessed up to 7.5 million times a day. *Id.*

Police across the country use NCIC profiles to track a large and diverse set of attributes. In Tennessee, Memphis city police officers "can use a

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[9] Available at http://judiciary.senate.gov/pdf/11910%20Weise%20Testimony.pdf.

[10] http://www.fbi.gov/about-us/cjis/ncic/ncic.

[11] http://www.l1id.com/pages/425-intellimobile.

hand-held device to instantly call up a mug shot, a Social Security number, the status of the driver's license and any outstanding warrants," and an in-car laptop to learn "more about who owns the vehicle, the owner's name and address and criminal history, and who else with a criminal history might live at the same address." Dana Priest and William M. Arkin, *Monitoring America*, Wash. Post, Dec. 20, 2010, at 2.[12] NCIC profiles detail a subject's supervised release from prison, potential violations of immigration law, and status as a foreign fugitive, sex offender, wanted person, suspected terrorist, or gang member. Federal Bureau of Investigation, *National Crime Information Center*.[13] Court protection orders and Secret Service protective orders are recorded on NCIC profiles, in addition to registered instances of identity theft and missing or unidentified persons. *Id.*

The NCIC profiles consist of "fields" and "codes." *See generally*, Federal Bureau of Investigation, *NCIC Code Manual: Personal Descriptors*, Mar. 3, 2010 (available through the Oregon State Police Law Enforcement Data System website).[14] Each "field" is a space on an NCIC profile allocated for a particular item of personal information. *See id.* A "code" is an item of personal information corresponding to a field. *See id.* The NCIC provides a field for "Sex," which enables officers to enter the code "F" to signify that the subject of a profile is female. *Id.* at 7. When an

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[12] http://projects.washingtonpost.com/top-secret-america/articles/monitoring-america/2/.

[13] http://www.FBI.gov

[14] http://www.oregon.gov/OSP/CJIS/NCIC.shtml

officer submits an "F" in the "Sex" field of an individual's NCIC profile, every other agency who accesses that profile will know that the individual has been identified as female. There are thirty-four "personal descriptor" fields on NCIC profiles; each contains personal data about individuals. *Id.* at 2-4 ("Table of Contents"). Another field, "Offender Status," enables NCIC users to submit profile information pertaining to the subject's whereabouts (e.g., code "C4" signifies that the subject is "transient or homeless" and code "AY" signifies that the subject is known to be out of the country). *Id.* at 64-70.

The personal information transmitted by the NCIC is particularly invasive. Codes corresponding to the "SMT" field ("Scars, Marks, and Tattoos") provide submitters with abbreviated codes signaling that a subject has extra body parts (e.g., "EXTR BRST," "EXTR NIP"), missing body parts ("MISS BRSTS," "MISS PENIS," "MISS UTRUS"), implants ("ART BRSTS," "IMPL PENIS"), eating disorders ("MC EATDIS"), drug addictions ("DA GLUE"), past pregnancies ("MC PASTPRE"), and pierced body parts ("PRCD GNTLS"), among other sensitive attributes, such as non-abusive use of anti-depressants ("TD ADEPRES"). *Id.* at 17-40.

This is a vast array of personal data, available to a police officer in a patrol car, unrelated to motor vehicle safety or the enforcement of traffic laws.

C. The Integrated Automated Fingerprint Identification System

Another sizeable pool of retrievable sensitive data comes from the Integrated Automated Fingerprint Identification System ("IAFIS"): the largest biometric database in the world. Federal Bureau of Investigation, *Integrated Automated Fingerprint*

Identification System.[15] The IAFIS contains fingerprints from 66 million convicted and suspected criminals and 25 million "civil prints." *Id.* The FBI launched IAFIS in 1999, digitizing and streamlining the national repository of paper-based fingerprints it had maintained since 1924. *Id.* Fingerprint records in the IAFIS are accessible through the Interstate Identification Index ("III"), which police can access through the same network as the NCIC. Federal Bureau of Investigation, *Five Key Services*.[16]

In the wake of a decade of intelligence sharing initiatives, the IAFIS system is being formatted to accept fingerprint and digital photographs collected by Immigration and Customs Enforcement ("ICE")[17] and the Department of Homeland Security ("DHS")[18], enabling fingerprints submitted through one system

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[15] http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis.

[16] http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services; "National Crime Information Center," Mass.gov, http://www.mass.gov/?pageID=eopsterminal&L=3&L0=Home&L1=Law+Enforcement+%26+Criminal+Justice&L2=Criminal+Justice+Information+Services+%28CJIS%29&sid=Eeops&b=terminalcontent&f=chsb_cjis_ncic&csid=Eeops

[17] ICE manages the United States Visitor and Immigration Status Indicator Technology ("US-VISIT").

[18] DHS manages the Automated Biometric Identification System ("IDENT").

to be checked against the others by default.[19] ICE plans to achieve full interoperability by 2013.[20]

As a consequence, police car stops will combine the identification techniques of biometrics with search across a wide range of government databases that contain individuals' personal, sensitive information.

D. E-Verify

The E-Verify program is a federal employment eligibility verification system ("EEVS") operated by the Department of Homeland Security ("DHS"). DHS, "E-Verify."[21] E-Verify is an Internet-based system that allows employers and others to submit an individual's personal information and receive a response stating the DHS's opinion concerning the individuals' citizenship status. *Id.* Experts and government reports have identified widespread inaccuracies in the E-Verify database.[22] The DHS

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[19] Department of Homeland Security, *Privacy Impact Assessment for the Interim Data Sharing Model (iDSM) for the Automated Biometric Identification System (IDENT)/Integrated Autmated Fingerprint Identification System (IAFIS) Interoperability Project 2* (Sept. 1, 2006), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_idsm.pdf; Press Release, U.S. Immigration and Customs Enforcement, *Secure Communities Strategy at Work in Fairfax County* (Mar. 16, 2010), http://www.ice.gov/news/releases/1003/100316fairfax.htm.

[20] Id.

[21] http://www.dhs.gov/files/programs/gc_1185221678150.shtm.

[22] Section II *infra*.

permits law enforcement agencies to access E-Verify data.[23] Police have arrested individuals based on E-Verify database queries.[24] In 2008, the state of Rhode Island mandated the use of E-Verify and directed State police officers to use the system as a basis for law enforcement initiatives.[25]

E. Fusion Centers

States are implementing programs that provide patrol cars with access to "fusion center" databases. G.W. Schultz, *Maryland to Store License-Plate Scanner Data at Intel Fusion Center.*[26] Fusion centers began as the outgrowth of state-based intelligence analysis units, analyzing numerous streams of data from a variety of state-based sources. Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., *Fusion Centers: Issues and Options for Congress, RL34070* 20, 19 (July 6, 2007). Starting

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[23] Department of Homeland Security, *Privacy Impact Assessment for the E-Verify Program* at 34, May 4, 2010, www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_everify.pdf; *see also* 8 U.S.C. § 1357(g) (authorizing access to facilitate "performance of immigration officer functions by State officers and employees.").

[24] Philip Marcelo, *Impact of Carcieri's Immigration Order Under Scrutiny*, Providence Journal, Nov. 20, 2010.

[25] Gov. Donald L. Carcieri, Rhode Island Executive Order 08-01 (March 27, 2008); *but see* Gov. Lincoln Chafee, Rhode Island Executive Order 11-02 (January 5, 2011) (repealing E-Verify mandate).

[26] http://www.centerforinvestigativereporting.org/blogpost/20100809marylandtostorelicenseplatescannerdataatintelfusioncenter

in 2006, Federal Fusion Center Guidelines recommended that state fusion centers collect a wide stream of data, including substantial amounts of personal information concerning individuals who are not suspected of any crime. The guidelines direct fusion center to collect data regarding:

> Agriculture, Food, Water and the Environment, Banking and Finance, Chemical Industry and Hazardous Materials, Criminal Justice, Retail, Real Estate, Education, Emergency Services (Non-Law Enforcement), Energy, Government, Health and Public Health Services, Hospitality and Lodging, Information & Telecommunications, Military Facilities and Defense Industrial Base, Postal and Shipping, Private Security, Public Works, Social Services, [and] Transportation.

Global Justice Info. Sharing Initiative, Dep't of Justice, Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era -- Guidelines for Establishing and Operating Fusion Centers at the Local, State, and Federal Levels – Law Enforcement Intelligence, Public Safety and the Private Sector 2 (Aug. 2006). The Department of Justice recommends that state fusion centers capture personal data about individuals by accessing a variety of government and commercial systems, such as:

- Driver's license,
- Motor vehicle registration,
- Location information (411, addresses, and phone numbers),
- Law enforcement databases,

- National Crime Information Center (NCIC),
- NLETS -- The International Justice and Public Safety Information Sharing Network,
- the Terrorist Screening Center (TSC),
- Criminal justice agencies,
- Public and private sources (Security Industry databases, Identity Theft databases, Gaming Industry databases),
- Regional Information Sharing Systems
- (RISS)/Law Enforcement Online (LEO)
- U.S. Department of Homeland Security's (DHS) Homeland Security Information Network (HSIN), including the United States Private-Public Partnership (USP3) – formerly HSINCI.
- Organizational and association resources
- InfraGard, The Infrastructure Security Partnership,
- Sex offender registries,
- Violent Criminal Apprehension Program (VICAP),
- Health- and Public Health-Related Databases (Public Health Information Network, Health Alert Network).

Id. at 33-34. The Department of Homeland Security assists states in retrieving this information by identifying "key players" and intelligence requirements, facilitating information dissemination between different government agencies, and "provid[ing] security clearances to appropriate members of private sector leadership." *The Future of Fusion Centers: Potential Promise and Dangers:*

Hearings Before the H.Comm on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec., 111th Cong. 16 (2010) (statement of Robert Riegle, Director, State and Local Program Office, Office of Intelligence and Analysis, Dept. of Homeland Sec.).

In 2010, the DHS proposed to establish a new Federal Fusion Center and exempt all disclosures to state and local fusion centers from Federal Privacy Act obligations. Privacy Act of 1974: Department of Homeland Security Office of Operations Coordination and Planning–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records, 75 Fed. Reg. 219, 69689 (Nov. 15, 2010). Going forward, DHS intends to establish a national fusion network. *The Future of Fusion Centers: Potential Promise and Dangers: Hearings Before the H.Comm on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 35-36 (2010) (testimony of Robert Riegle, Director, State and Local Program Office, Office of Intelligence and Analysis, Dept. of Homeland Sec. and of Sheriff Leroy D. Baca, Los Angeles County Sheriff).

This increased data dissemination is problematic for many reasons, including the fact that fusion centers use erroneous information culled from government and commercial databases. Moreover, law enforcement personnel rely on these new integrated state databases even as states are suspending the privacy obligations and open government requirements that would otherwise require public accountability in the management of these systems. In the state of Virginia, for example, legislation was enacted that would suspend the

application of the Virginia Freedom of Information Act and the Virginia Collection and Dissemination Practices Act to the Virginia Fusion Center. H.B. 1007, 2008 Gen. Assem., Spec. Sess. (Va. 2008).

F. Combined DNA Index System

Statutes in all states require certain convicted offenders, including all felons, to submit DNA samples to be indexed in state-based DNA databases. National Conference of State Legislatures *DNA in Criminal Justice*[27] The collection of DNA is increasing and now includes many individuals who have not been convicted of any crime.

In 2008, state police officers in Daytona Beach, Florida deployed "special DNA kits" to collect DNA mouth swabs from persons of interest in a serial murder case. WKMG Orlando, *Police Swabbing Mouths During Traffic Stops in Serial Killer Hunt* (Feb. 6, 2008)[28] In 2009, the FBI decided to expand the collection of DNA samples at the federal level from convicts to all subjects of arrest. Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. Times, Apr. 18, 2009.[29] "The move, intended to help solve more crimes, is raising concerns about the privacy of petty offenders and people who are presumed innocent."[30] *Id.* One expert stated:

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[27] http://www.ncsl.org/IssuesResearch/CivilandCriminalJustice/DNAinCriminalJustice/tabid/12727/Default.aspx.

[28] http://www.local6.com/news/15232197/detail.html.

[29] http://www.nytimes.com/2009/04/19/us/19DNA.html?_r=1.

[30] *Id.*

> "DNA databases were built initially to deal with violent sexual crimes and homicides — a very limited number of crimes," said Harry Levine, a professor of sociology at City University of New York who studies policing trends. "Over time more and more crimes of decreasing severity have been added to the database. Cops and prosecutors like it because it gives everybody more information and creates a new suspect pool."[31]

In 2010, California began taking DNA samples upon arrest, doubling the annual growth rate of its database to 390,000 profiles per year.[32] By 2012, the FBI expects its current database of 6.7 million profiles to expand by 1.2 million new profiles per year.[33]

II. Law Enforcement Officials Should Not Routinely Rely on Inaccurate Identity-Based Information Systems

Increasingly, law enforcement officials and other government employees are relying on government and commercial databases full of mistakes that are well-documented but rarely corrected. Government systems include the NCIC database and databases associated with the federal government's employment E-Verify system. Commercial databases include information from databrokers such as Choicepoint. As these errors are distributed to various law

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[31] *Id.* (Harry Levine, a professor of sociology at City University of New York).

[32] *Id.*

[33] *Id.*

enforcement and other groups through the Information Sharing Environment and fusion centers, enormous difficulties are created for innocent individuals.

A. Inaccuracies in the National Crime Information Center ("NCIC")

The NCIC, discussed in Section I above, is a system that makes criminal history information widely available to police officers and law enforcement officials across the United States. FBI, *National Crime Information Center.*[34]

The problem of record accuracy has plagued the NCIC system for years. According to the Bureau of Justice Statistics ("BJS"), "[i]n the view of most experts, inadequacies in the accuracy and completeness of criminal history records is *the single most serious deficiency* affecting the Nation's criminal history record information systems." Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update, NCJ 187670 at 38 (Dec. 2001) (emphasis added).

In the most recent report, the BJS detailed ongoing concerns about errors in NCIC databases. BJS, *Improving Access to and Integrity of Criminal History Records*, NCJ 200581 (July 2005). The BJS points to problems with State criminal history records, which are fed into the NCIC. "Recent BJS surveys have suggested that criminal history repositories are encountering several problems

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[34] http://www.fbi.gov/about-us/cjis/ncic/ncic.

including significant backlogs, older records that have no dispositions, and infrequent audits to ensure accuracy of records." *Id.* Also, "Repositories in States that could estimate the size of their backlogs in 2001 reported that 2.5 million records of arrest, disposition, and custody information were unprocessed or only partially processed." *Id.*

Though the errors are well-known, the BJS found that audits of these records are infrequent. "In 2001, 23 State criminal history repository directors reported that their databases had not been audited for completeness in the prior 5 years. [...] Over half of those States (13) reported that they had not planned or scheduled a data quality audit to occur within the next 3 years. Overall, 24 States did not plan to perform a data quality audit within 3 years of the survey." *Id.*

The BJS said in 2001 that, if incomplete or inaccurate records are used *"there is a substantial risk that the user will make an incorrect or misguided decision."* *Id.* (emphasis added). Because the criminal history information is available to both private and public entities, misguided decisions may lead to an unjustified arrest, a lost employment opportunity, or inability to purchase a firearm. *Id.* There have not been many "in-depth audits or reviews of the accuracy of the information maintained by State and Federal criminal history record repositories" conducted, according to the report, but "most of those that have been conducted have found unacceptable levels of inaccuracies." *Id.* at 39.

The Department of Justice has sought to address concerns about record accuracy through the National Criminal History Improvement Program ("NCHIP").

Dep't of Justice, Bureau of Justice Statistics, *National Criminal History Improvement Program (NCHIP)*.[35] The goal of the program is to "insure that accurate records are available for use in law enforcement," and to provide "direct funding and technical assistance to the States to improve the quality, timeliness and immediate accessibility of criminal history and related records." *Id.* Between 1995 and 2002, more than $390 million dollars were allocated under the NCHIP program. Bureau of Justice Statistics, *Improving Criminal History Records for Background Checks* (May 2003).[36]

Nonetheless, as the 2005 BJS report makes clear, record accuracy continues to plague the criminal justice system. And with the continued expansion of the NCIC and the growth of fusion centers, the problem will become more severe.

Even though the federal Privacy Act makes clear the need to ensure accurate records and the federal government recognizes that these databases are filled with errors, that has not stopped federal agencies from increasingly attempting to exempt themselves from Privacy Act of 1974, 5 U.S.C. § 552a, provisions that require record accuracy. The agencies attempt to exempt themselves under §552a(j) (general exemptions) and §552a(k) (specific exemptions). 5 U.S.C. §§ 552a(j), (k). Such exemptions from the general accuracy requirements applicable to government record-keeping systems undermine the argument that there are alternatives to the

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[35] http://www.ojp.usdoj.gov/bjs/nchip.htm.

[36] http://www.ojp.gov/bjs/abstract/ichrbc.htm.

exclusionary rule that will produce the appropriate level of accuracy.

The NCIC is an important and widely used database that is full of record inaccuracies. Yet, in 2003, the Department of Justice chose to exempt the NCIC from numerous mandates established by the Privacy Act, 5 U.S.C. § 552a, most notably accuracy requirements. As a result of this exemption, the FBI need not comply with 5 U.S.C. § 552a(e)(5), which requires an agency to "maintain all records which are used by the agency in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual[.]" 5 U.S.C. § 552a(e)(5). The NCIC is also exempt from 5 U.S.C. § 552a(e)(1), which requires that a system of records contain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency[.]" *Id.* at § 552(e)(1).

B. Problems with Databases Associated with the Federal Government's Employment Eligibility Verification System

As discussed in Section I *supra*, law enforcement agents have access to E-Verify, the federal government's current employment eligibility verification system ("EEVS"). Several reports highlight inaccuracies in the government database used for employment verification. The errors in the federal government's employment eligibility verification system are so egregious and their effects so significant, that a federal judge cited to them in an opinion granting a temporary restraining order against the Department of Homeland Security.

The government reports documenting the errors in databases connected with EEVS date back more than 10 years. In a 1997 report and a 2002 follow-up review, the Inspector General of the Department of Justice found that data from the Immigration and Naturalization Service (the predecessor of U.S. Citizenship and Immigration Services) were unreliable and "seriously flawed in content and accuracy." Office of Inspector Gen., Dep't of Justice, *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays*, Rept. No. I-97-08 (Sept. 1997); *Follow-Up Report on INS Efforts to Improve the Control of Nonimmigrant Overstays*, Rept. No. I-2002-006 (Apr. 2002); and *Immigration and Naturalization Service's Ability to Provide Timely and Accurate Alien Information to the Social Security Administration*, Rept. No. I-2003-001 (Nov. 2002).

In August 2005, the Government Accountability Office investigated and found myriad errors in information from DHS databases searched through its employment eligibility verification system. Gov't Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 25 (Aug. 2005).

The Social Security Administration's Office of Inspector General found accuracy problems in databases of Citizenship and Immigration Services and Social Security Administration. Office of Inspector Gen., Soc. Sec. Admin., *Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File*, A-08-06-26100 (Dec. 18, 2006). The Inspector General estimated that about 17.8 million records in the Social Security Administration's Numerical Identification File

("NUMIDENT") have discrepancies with name, date of birth or death, or citizenship status. *Id.* at 6. About 13 million of these incorrect records belong to U.S. citizens, he said. *Id.* at Appendix C-2.

A federal judge pointed to the problems in NUMIDENT in an October 2007 opinion granting a temporary restraining order enjoining the Department of Homeland Security from implementing a new "no-match" employment eligibility verification proposal.

> As demonstrated by plaintiffs, the government's proposal to disseminate no-match letters affecting more than eight million workers will, under the mandated time line, result in the termination of employment to lawfully employed workers. This is so because, as the government recognizes, the no-match letters are based on SSA records that include numerous errors.

AFL-CIO v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007).

It is clear that the federal government's employment eligibility verification system is based on erroneous databases. As fusion centers continue to mix and mingle data from a multitude of government and commercial databases without clear accuracy or relevance obligations, the risk of record inaccuracy and data misuse increases. This strongly implicates the accuracy and reliability of the criminal justice records that would become accessible from a patrol car.

Multiple government assessments state that the watch lists remain filled with errors. The Justice Department Inspector General has said this indicates "a deficiency in the integrity of watchlist

information."[37] These watch lists are used to screen "approximately 270 million individuals . . . each month."[38] Such mistakes show it is paramount that government entities are held accountable for accuracy of their databases.

C. Commercial Databases on Which Law Enforcement Rely Are Also Inaccurate and Incomplete

There is extensive documentation of errors in commercial databases, as well. The government has increasingly relied upon these databases in its law enforcement activities and, as explained earlier, the federal Fusion Center Guidelines urge the intermingling of commercial data with information culled from government systems. For example, databroker Choicepoint trumpets on its Web site the various federal, state, local and law enforcement "solutions" that the company offers. These reports often include information that is erroneous, out of date, incomplete, unreliable, or just flat-out false.

A man bought his Choicepoint record and found that the file showed he had died in 1976. Jane Black, *Data Collectors Need Surveillance, Too*, Business Week, Jan. 24, 2002. Another man's report included numerous crimes that he never committed. "In Florida I'm a female prostitute (named Ronnie); in Texas I'm currently incarcerated for manslaughter," according to the man. Kim Zetter, *Bad Data Fouls Background Checks*, Wired News, Mar. 11, 2005.

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[37] Justice Dept. Report on Watch Lists at xxii.

[38] *Id.* at v.

Also, "in New Mexico I'm a dealer of stolen goods. Oregon has me as a witness tamperer. And in Nevada – this is my favorite – I'm a registered sex offender."[39]

Another Choicepoint file contained significant errors. The record of one woman listed "possible Texas criminal history" even though she has been to Texas only twice and has not been charged with or committed crimes there. Bob Sullivan, *ChoicePoint Files Found Riddled With Errors*, MSNBC, Mar. 8, 2005. Her record also included "three automobiles she never owned and three companies listed that she never owned or worked for."[40]

When a news reporter looked up his file on databroker Intellius.com, he found the record said he was charged with child molestation (he wasn't) and that he had a close male relative who was convicted of manslaughter (the reporter had never even heard of the man). Bob Sullivan, *Red Tape Chronicles: Bob the Writer, Bob the Molester*, MSNBC, May 3, 2006.

These are just a few of the many erroneous records that have been compiled by Choicepoint and other databrokers used by the federal government for law enforcement purposes.

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[39] *Id.*

[40] *Id.*

III. Driver Identity Information Is Entitled to Strong Privacy Protection

A. The Drivers Privacy Protection Act

In *Reno v. Condon*, 528 U.S. 141 (2000), the Supreme Court upheld the 1994 Drivers Privacy Protection Act ("DPPA"), which protects the personal information contained in DMV record systems maintained by the states. 18 U.S.C. § 2721 ("Prohibition on release and use of certain personal information from State motor vehicle records.") The DPPA "generally prohibits any state DMV, or officer, employee, or contractor thereof, from 'knowingly disclosing or otherwise making available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.' 18 U.S.C. § 2721(a)." *Reno v. Condon*, 528 U.S. at 144. The DPPA reflects a determination by Congress that even though individuals may be required to provide certain personal information to obtain a driver's license, that information should be protected and should be disclosed and used only for appropriate purposes.

Under the DPPA, the disclosure of "personal information" is restricted. "Personal information" is defined as "names, photographs, social security numbers, drivers license numbers, addresses, telephone numbers, and medical and disability information of individuals." 18 U.S.C. § 2725(3). The statute sets out limited circumstances when personal information may be disclosed and provides penalties for violations of the Act. 18 U.S.C. § 18 U.S.C. 2721(b) ("Permissible uses.") "The DPPA's ban on disclosure of personal information does not apply if drivers have consented to the release of their data," *Reno v.*

Condon, 528 U.S. at 144, however such consent does not exist where a driver is required to provide their license to a police officer in the context of a car stop.

In *Reno*, a unanimous Court held the DPPA to be a proper exercise of Congress' regulation of interstate commerce and does not abridge federalism principles. Chief Justice Rehnquist found that the "DPPA regulates the States as the owners of databases . . . . The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information-the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce." *Id.* at 151. The Court also found that "The DPPA regulates the disclosure and resale of personal information contained in the records of state DMV's by limiting the state's ability to disclose a driver's personal information without her consent." *Id.* at 143-44.

In *Reno*, *amici* EPIC urged the Court to hold that the DPPA "is a valid exercise of federal authority in that it seeks to protect a fundamental privacy interest." Brief of Amicus Curiae Electronic Privacy Information Center at 1, *Reno v. Condon*, 528 U.S. 141 (2000). EPIC observed that "The states should not impermissibly burden the right to travel by first compelling the collection of sensitive personal information and then subsequently disclosing the same information for unrelated purposes." *Id.* at 1.

B. Application of Reno

Following *Reno*, federal and state courts have applied the decision in other cases involving the disclosure of personal information contained in DMV records. While a federal trial court found in *Russell v.*

Choicepoint, 302 F. Supp. 2d 654 (E.D. La. 2004), that *Reno* did not make any determinations about the scope of the statute when it held that the privacy protections in DPPA were constitutional, the Supreme Court of Iowa explained that Congress' intent to limit access to personal information in state motor vehicles databases means that "disclosure essentially depends on the use sought for the information, and the states are charged with the responsibility to ensure that disclosure is limited to those circumstances where Congress determined that the use for the information trumps the competing privacy interest." *Locate Plus Com, Inc. v. Iowa Dept. of Transp.*, 650 N.W.2d 609, 616 (Iowa 2002); *see also O'Brien v. Quad Six, Inc.*, 219 F.Supp.2d 933, 934-935 (N.D. Ill. 2002) (finding that the DPPA "seeks to control dissemination of information collected using the coercive power of the state.").

Courts routinely emphasize *Reno*'s interpretation of the DPPA as highly protective of drivers' personal information. *DeVere v. Attorney General*, 146 N.H. 762, 768 (N.H. 2001), construed New Hampshire's amended DPPA to mean that "in light of" the New Hampshire "statute's general prohibition against disclosure, this procedure [allowing in certain circumstances a court ordered disclosure of DMV records for the benefit of a private party . . . cannot be read to provide a general right of access to private parties simply by invoking the court's status as a governmental agency." *Id.* *See also, Myerson v. Prime Realty Services, LLC* 796 N.Y.S.2d 848 (2005) (explaining that "[t]here is a broad federal policy against the government revealing individuals' social security numbers. There are a variety of federal statutory restrictions on dissemination of such

information, such as the federal Driver's Privacy Protection Act of 1994").

Courts have also found that the other state agencies receiving funds subject to the terms of DPPA are expected to protect personal information even if they are not themselves departments of motor vehicles. *See, Hartman v. Dept. of Conservation and Natural Resources*, 892 A.2d 897, 901-902 (Pa. Commw. 2006), determining that state agencies made subject to the DPPA by another federal statute, such as the Transportation Equity Act for the 21st Century (TEA-21, Pub.L. No. 106-69, 113 Stat. 986, 1025-1026 (1999), "makes any recipient of the transportation funds subject to the terms of the DPPA, regardless of whether that person is a "State Department of motor vehicles."

In terms of permissible uses, courts have determined that the "DPPA affords states discretion to disburse DMV records for a permissible purpose under the statute," *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010). In *Young v. West Pub. Corp.*, 724 F.Supp.2d 1268, 1279 (S.D. Fl. 2010), the District Court found that while the DPPA does not apply if drivers have consented to the release of their data, the DPPA "was intended to prevent unfettered access to personal information and to give individuals more control over the disclosure of their personal information, while continuing to allow state departments of motor vehicles to disclose the information for legitimate government and business needs." *Graczyk v. West Pub. Corp.*, 2009 WL 5210846, at *5 (N.D. Ill. 2009). Furthermore, "[t]he DPPA is written to restrict uses of personal information rather than users of that information." *Id.* at *4.

A private right of action has been upheld by courts applying *Reno* in other cases involving the DPPA. In *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005), the Seventh Circuit found that the DPPA "authorizes private suits, but only by persons whose information has been disclosed improperly." In *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007), the Eleventh Circuit found that the statutory right to privacy created by DPPA was enforceable separately under Section 1983 and that officials were not entitled to qualified immunity. "We find that the plain language of the DPPA clearly, unambiguously, and expressly creates a statutory right which may be enforced by enabling aggrieved individuals to sue persons who disclose their personal information in violation of the DPPA."477 F.3d at 1309-10.

CONCLUSION

Amici respectfully ask this Court to grant Petitioner's motion and reverse the decision of the lower court.

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No. 09-11556

In the Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF OF MASSACHUSETTS, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, LOUISIANA, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of State records consulted by law enforcement officials following a putatively unlawful automobile stop, where the records were in the government's possession prior to the stop and reflected decrees by a State regulatory body that had the force of law.

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INTEREST OF AMICI CURIAE

Amici Curiae are twenty-six States of the Union. They are thus among those that "possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). To that end, they seek to deter and punish criminal activity meaningfully, to administer justice efficiently, and generally to ensure that their communities are safe and their laws and justice systems are respected. They also desire to see the conduct of their law enforcement officials evaluated in a fair and accurate manner.

The States additionally have an interest in maintaining the proper functioning of the federal system and their own sovereign status and role therein. At the same time, the States are committed to seeing the rights of their citizens respected and are ever aware that they "hold the initial responsibility for vindicating constitutional rights" in criminal adjudications. *Id.*

Amici offer their perspectives in an effort to ensure that all the above interests are justly and sensibly balanced as the law is clarified and refined.

SUMMARY OF ARGUMENT

Petitioner asks that records maintained by the New York State Department of Motor Vehicles ("DMV") concerning the suspension of his driver's license be excluded from his State trial for driving with a suspended license. He argues that police consulted the DMV records and learned of his numerous license suspensions as a result of a

putatively unlawful stop of the car that he was driving. The New York Court of Appeals held that the evidence challenged by Petitioner should not be suppressed because "a defendant may not invoke the fruit-of-the-poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." J.A. 106a. That conclusion was correct for the reasons outlined by Respondent, which need not be repeated here. Amici thus focus on additional reasons to affirm.

I. Petitioner seeks an unprecedented extension of the exclusionary rule. It is established that the exclusionary rule "does not reach backward to taint information that was in official hands prior to any illegality." *Maryland v. Macon*, 472 U.S. 463, 471 (1985). Petitioner argues that the DMV records are nevertheless suppressible because officials were directed to the records and assigned meaning to them as a result of the stop.

But Petitioner fails to recognize that this Court found the exclusionary rule inapplicable in such circumstances in *United States v. Crews*, 445 U.S. 463 (1980). There, an unlawful seizure of a defendant led officials to turn their attention to evidence previously in their possession. The Court still found that the consequent in-court identification of the defendant was admissible. It concluded that the identification was not the product of the seizure, as it was based on evidence that was in the government's possession beforehand.

II. This Court has maintained that the exclusionary rule should not be extended unless its

costs are outweighed by an appreciable and substantial deterrent effect. Extending the rule to evidence that was already in the government's possession would result in substantial social costs. It would interfere with the truth-finding process of criminal trials, often lead to the release of guilty and even dangerous criminals, and may generate disrespect for the justice system. When the rule is applied in State prosecutions, an added cost is potential federal-State friction. Moreover, because Petitioner's extended rule could be applied to other types of evidence, these costs would be incurred in situations beyond those involving driving records.

Meanwhile, extending the rule would not have an appreciable deterrence effect. Officers now are deterred from misconduct by the prospect of internal discipline, citizen review, and civil liability. They also know that any newly-acquired evidence would normally be suppressible. And they confront a risk of personal harm each time they engage in contact with a citizen. The chance of being led to information already in government files is not significant enough to offset these disincentives.

An additional reason not to extend the rule is that the government's introduction of its own information does not involve either exploitation or coercion, two concerns that have been found to warrant the rule's application.

III. Even if this Court wishes to leave the door open for a future extension of the exclusionary rule to certain types of evidence previously in the government's possession, it should lock the door shut with respect to one type: evidence of governmental

decrees.[1] The statutorily-authorized license suspensions issued by the DMV Commissioner fall squarely within that category. This Court has held that the exclusionary rule should not apply in situations where there would be extraordinary injury to our system of government. Such injury would result if federal law were to compel State courts to exclude State governmental decrees. Specifically, State sovereignty would be offended, and comity and federalism would be undermined, in ways additional to those involved when other types of evidence are excluded. Moreover, the costs are especially high because evidence far beyond driving records would be implicated by an extension of the exclusionary rule.

ARGUMENT

I. Petitioner seeks an unprecedented extension of the exclusionary rule.

What Petitioner seeks is not a mere application of existing exclusionary rule jurisprudence, but an extension of the rule beyond its current reach.

This Court's case law establishes that the exclusionary rule "'does not reach backward to taint information that was in official hands prior to any illegality.'" *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (quoting *United States v. Crews*, 445 U.S. 463,

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[1] Amici use the term "governmental decree" broadly to mean any order, ruling, determination or other official decision issued by a branch of the government with the authority to issue it. *See also infra* Part III

475 (1980) (Brennan, J., joined by Stewart & Stevens, JJ.)). Petitioner argues that the DMV records are nevertheless suppressible because they came to the attention of, and became meaningful to, officials as a consequence of the stop. Pet. Br. 35. He contends that these factors make his case distinguishable from *Crews*. *Id.*

Petitioner fails to appreciate, however, that the *Crews* Court refused to extend the exclusionary rule in just such a situation. In that case, the unlawful arrest and photographing of the defendant caused the police to turn their attention back to the victim of a robbery, and to definitively connect the defendant to the crime. 445 U.S. at 467. Nevertheless, the Court still unanimously concluded that the victim's in-court identification of the defendant did not need to be suppressed. *Id.* at 471-74. It recited the proposition in the seminal *Wong Sun* case that evidence is not necessarily "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.* at 469 n.9 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). Rather, the question is whether the evidence "'has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun*, 371 U.S. at 487-88). As the *Crews* Court explained, "[i]n the typical 'fruit of the poisonous tree' case, . . . the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation," and is thus "in some sense the product of illegal government activity." *Id.* at 471 (emphasis in original).

The in-court identification at issue, the Court determined, was not "the product of" or "come at by exploitation of" the police misconduct. *Id.* at 471-74. Rather, the identification was based on evidence and information that was in the government's possession before the unlawful arrest. *Id.*; *see also id.* at 474-77 (Brennan, J., joined by Stewart & Stevens, JJ.). That is, even before the arrest, the victim had a memory of her assailant and the ability to recognize him, and the police knew the victim's identity. *Id.* at 471-73. Also in advance of the misconduct, the police had obtained information from the victim regarding the assailant's appearance, learned the defendant's identity, and "had some basis to suspect his involvement" in the robbery. *Id.* at 474-77 (Brennan, J., joined by Stewart & Stevens, JJ.). Although the police turned their attention back to this evidence because of the illegal arrest, the identification nevertheless was not "traceable to any Fourth Amendment violation." *Id.* at 472. It thus was not suppressible. *Id.* at 471-74.

Contrary to Petitioner's claims, therefore, *Crews* forecloses his argument. While Petitioner's driving records may have "come to light" as a result of the putatively illegal stop, they were not the "product of" the stop, because they were in the government's possession beforehand. While a branch of the poisonous tree may have pointed officials back toward those records (as happened in *Crews*), it did not spawn them as fruit. Thus, under *Crews*, suppression of Petitioner's driving records is not warranted.

II. This Court should not extend the exclusionary rule to previously-possessed evidence that came to officials' attention through an unlawful search or seizure.

This Court should not extend the exclusionary rule to evidence previously possessed by the government merely because it became the focus of officials' attention as a consequence of an unlawful search or seizure. As the Court has made clear, the "last resort" of exclusion is unwarranted unless it would result in an appreciable and substantial deterrence of police illegality that outweighs the rule's "substantial social costs." *Herring v. United States*, 129 S. Ct. 695, 700-04 (2009). Here, it would not. Further, the government's use of its own information does not involve either exploitation or coercion, two concerns that have been found to warrant application of the rule.

A. Excluding previously-possessed evidence would impose substantial costs.

As an initial matter, the costs of extending the exclusionary rule to evidence in the government's possession prior to the unlawful search or seizure include those attendant to any application of the rule. Such an extension would deprive factfinders of reliable and probative evidence, allow guilty and even dangerous criminals to go free, and contribute to public cynicism concerning the justice system. *See, e.g., United States v. Leon*, 468 U.S. 897, 906-08 (1984).

There are added costs whenever the federal exclusionary rule is applied in State cases. Any federal intrusion into State criminal prosecutions may create "friction between States and Nation." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). But there is a higher potential for friction associated with the exclusionary rule, given that it is not constitutionally mandated, but a vehicle the Court adopted to impel State law enforcement officers to conform their conduct to federal law. *Cf. United States v. Janis*, 428 U.S. 433, 459 (1976) (describing application of rule as "the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches").

Here, all the above costs are compounded by the potential reach of an extension of the rule to previously-possessed evidence. Courts could apply a ruling in Petitioner's favor to exclude a wide range of previously-possessed items. The rationale would merely be that officials were prompted to consult them as a consequence of an unlawful search or seizure. Such items could include witness statements, evidence found at crime scenes, audio or video recordings, filings made with state agencies, or other documentation obtained through investigation. A court might even view an officer's own memory as suppressible, if it was "consulted" as a result of unlawful conduct.

A few scenarios are illustrative. Suppose, for example, an officer sees a man talking to a boy in a public playground. He detains the man in what is found to be an unlawful stop. Upon questioning, the man reveals certain personal information. Using that, the officer consults a state sex offender registry

and learns that the man is a registered child sex offender. He then realizes that that status made his fraternizing with the boy unlawful.[2] With a ruling in Petitioner's favor, a court might exclude evidence of the man's sex offender status because the registry was consulted as a result of the unlawful stop. A prosecution might be precluded even though the officer had seen the criminal activity occurring in plain view and the sex offender information was in the possession of state officials long before the illegal stop.

As another example, consider an officer in a government building who unlawfully seizes a bag from a man, looks inside, and finds drugs (or, for that matter, a cash bribe, or prohibited explosives). He then checks the building's video surveillance system and finds that it recorded the man putting the incriminating items into the bag. The evidence seized by the officer would likely be suppressible under existing law. But with a decision for Petitioner here, a court might also order suppression of the videotape, even though the man's conduct had been captured on the government's video system before any police misconduct.

A third scenario is as follows. An officer seeks to compare a suspect's DNA to as-yet untested biological evidence taken from a rape victim. Without probable cause, he obtains the DNA sample

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[2] *Cf.*, *e.g.*, Ill. Comp. Stat., ch. 720, § 5/11-9.4 (establishing felony of "[a]pproaching, contacting, residing, or communicating with a child within certain places by child sex offenders"); Fla. Stat. § 856.022 (establishing offense of "[l]oitering or prowling by certain offenders in close proximity to children").

and, upon testing, finds that the evidence from the victim matches the sample that he obtained. The officer then discovers that it also matches a sample taken from the same man that, unbeknownst to the officer, was already in the State's DNA database. The seized DNA sample would probably be found suppressible under current law. But a ruling for Petitioner might lead a court also to exclude the sample from the State's database. The man might not be held accountable, even though the State had a sample of his DNA prior to the illegal seizure. *Compare Bynum v. United States*, 274 F.2d 767, 767 (D.C. Cir. 1960), *discussed with approval in Crews*, 445 U.S. at 476.

B. The benefits are marginal and speculative at best.

While extending the rule would be costly, it would have little, if any, deterrent effect. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson v. Michigan*, 547 U.S. 586, 596 (2006).

This Court has well noted the existing reasons not to conduct unlawful searches and seizures. They include "the increasing professionalism of police forces," "various forms of citizen review," and the prospect of civil liability for individual officers or their departments. *Id.* at 596-99. Another disincentive is that any *newly-acquired* evidence would be suppressed (provided no existing exception to the exclusionary rule applies). *Cf. New York v. Harris*, 495 U.S. 14, 20 (1990) ("[T]he principal incentive to obey [the rule at issue] still obtains: the

police know that a [violation] will lead to the suppression of any evidence found.").

Added to the above is the unfortunate reality that any traffic stop or other contact with a suspect involves a significant risk of harm to a law enforcement officer. In the most recent year for which figures are available, it was estimated that police-citizen contact resulted in an actual or threatened use of force close to 1.14 million times. Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts Between Police and the Public, 2005* 1, 2, 7, 8 (2007). Traffic stops in particular led to such consequences an estimated 270,000 times. *Id.* at 1, 2, 7, 8, 9.[3]

Furthermore, between 2000 and 2009, traffic stops and related conduct led to nearly 6.5% of accidental and nearly 19% of felonious killings of law enforcement officers in the line of duty. Criminal Justice Info. Servs. Div., Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2009* tbls. 19, 20, 61 (2010) (omitting fatalities from attacks of September 11, 2001). They led to nearly 9.6% of assaults on officers in the last of those years. *Id.* tbl. 73. Other law enforcement activity involving direct citizen contact led to over 57.3% of all

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[3] The 1.14 million figure was calculated by multiplying the total number of annual police-citizen contacts, and the percentage of times that a citizen's most recent contact with police involved a use or threat of force. The 270,000 figure was arrived at by multiplying the estimated number of annual police-citizen contacts involving a use or threat of force, and the percentage of contacts involving a use or threat of force that arose from traffic stops.

felonious killings during that same decade, *id.* tbl. 19; and it led to over 63.3%, or 36,281, of the 57,268 assaults upon officers in the decade's last year, *id.* tbls. 70, 73.[4] The threat of personal harm provides yet another reason for officers to avoid improper searches and seizures.

The prospect that officers might be directed to evidence already in the government's possession does not change the equation. First, officers will not expect to be routinely led to evidence already in the government's possession. Moreover, as Petitioner himself explains, catching unlicensed drivers can be accomplished through other methods that are lawful and effective. Pet. Br. 52-53.

In short, the risk-to-reward ratio is already high enough to prevent officers from having an incentive to violate rights simply because evidence that the government already possesses may be admitted. Any "incremental deterrent effect which might be achieved by extending the rule" to such evidence is "speculative," "uncertain at best," and "undoubtedly minimal." *United States v. Calandra*, 414 U.S. 338, 351-52 (1974). Such "'marginal or nonexistent benefits . . . cannot justify the substantial costs of exclusion.'" *Herring*, 129 S. Ct. at 703.

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[4] The "other law enforcement activity" that led to felonious killings between 2000 and 2009 included that associated with non-traffic arrest situations, disturbance calls, civil disorder, investigation, handling of persons with mental illness, and tactical situations. The "activity of that type" that led to assaults in 2009 included all of the foregoing, except tactical situations.

C. The introduction of previously-possessed evidence involves no exploitation or coercion.

An additional reason not to exclude evidence already in the State's possession is that its admission does not raise concerns about exploitation or coercion. As noted above, the Court applies the exclusionary rule to prevent the introduction of evidence obtained "by exploitation" of illegality. *Wong Sun*, 371 U.S. at 487-88. Similarly, this Court extended the rule to the States in part because the "unconstitutional seizure of goods, papers, effect, documents, etc." is "tantamount to coerced testimony." *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (explaining that, without the rule, "the freedom from state invasions of privacy would be . . . severed from its conceptual nexus with the freedom from all brutish means of coercing evidence"); *accord Stone v. Powell*, 428 U.S. 465, 484 & n.21 (1976).

However, when the evidence that the government seeks to introduce consists of its own preexisting records – or other evidence previously in its possession – there is no such exploitation or coercion. The police did not acquire the evidence through an illegal search or any other form of coercion. *Cf. United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970) (Friendly, J.) (explaining that "[t]he Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act"); *United States v. Carson*, 793 F.2d 1141, 1148-49 (10th Cir. 1986) (concluding that "exploitation" within meaning of *Wong Sun* includes

coercing defendant into giving consent to search using fruits of primary illegality, but does not include requesting and receiving voluntary consent to search based on such fruits).

III. At the very least, the rule should not be extended to governmental decrees.

Even if this Court wishes to leave the door open for a future extension of the exclusionary rule to certain types of previously-possessed evidence, it should lock the door shut with respect to one type: governmental decrees. Amici use the term "governmental decree" to mean any order, ruling, determination, or other official decision issued by a branch of the government with the authority to issue it. It is legally binding and has the force of law. It may require or prohibit conduct, such as an environmental remediation order in the former circumstance, or a restraining order in the latter. A governmental decree is documented, typically in writing, and the government maintains a record of it. When used in court, it commonly is self-authenticating; a judge may even take judicial notice of a decree.[5] As discussed below, such decrees are fundamentally different than other types of evidence – different in significant ways that should be considered before the exclusionary rule is extended to encompass them.

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[5] *See, e.g.*, Uniform Rules of Evidence 901-02 (amended 1986), 13F U.L.A. 680-81, 790-92 (2004) (providing for authentication of public records through evidence of recordation, and self authentication of public records in certain circumstances); 2 Clifford S. Fishman, *Jones on Evidence: Civil and Criminal* §§ 2:108-2:112, at 211-24 (7th ed. 1992 & Supp. 2010) (explaining that courts take judicial notice of various forms of official acts by and records of public officers and agencies).

Subsection A, *infra*, demonstrates that the challenged evidence constitutes a governmental decree. Subsection B explains how the costs of requiring exclusion are especially high because evidence far beyond driving records would be implicated by an extension of the exclusionary rule. And Subsection C shows that (1) this Court has held that the exclusionary rule should not apply to situations that would impose extraordinary injury to our system of government and (2) compelling the exclusion of State governmental decrees would result in such injury. Specifically, State sovereignty would be offended, and comity and federalism would be undermined, in ways additional to those involved when other types of evidence are excluded.

A. The challenged evidence is a governmental decree.

Petitioner seeks to suppress "the information in DMV files *that his license had been suspended*." Pet. Br. 18 (emphasis added). Those suspensions constitute governmental decrees.

The Commissioner who issued them is an official of the State government with the charge of the DMV. *See* N.Y. Veh. & Traf. Law § 200. By State law, he is specifically authorized to issue license suspensions. *E.g.*, N.Y. Veh. & Traf. Law §§ 226(3), 510(1); *Barnes v. Tofany*, 261 N.E.2d 617, 618-20 (N.Y. 1970) (recognizing Legislature's intent to give DMV Commissioner "power" and "authority" "to impose sanction[]" of "suspension or revocation of the privilege of operating a motor vehicle").

Additionally, the Commissioner's suspension orders were binding on Petitioner. That is, upon their issuance, Petitioner's license was in fact suspended and he was prohibited from driving in the State of New York. *See People v. Rosenheimer*, 102 N.E. 530, 532 (N.Y. 1913) (stating that a driver "exercises a privilege which might be denied him, and not a right," and "the Legislature may prescribe on what conditions it shall be exercised").[6] And, of course, his failure to comply with those binding orders was a crime. N.Y. Veh. & Traf. Law § 511(1)(a), (3)(a)(ii). Thus, there is no doubt that the suspensions constitute governmental decrees that "ha[d] all the force of law." *People v. Teuscher*, 221 N.Y.S. 20, 24-25 (N.Y. Sup. Ct.) (referring to order by agency official, where statutes empowered him to issue orders and made violation of his orders criminal), *aff'd*, 226 N.Y.S. 881 (N.Y. App. Div. 1927), *and aff'd*, 162 N.E. 484 (N.Y. 1928) (Cardozo, C.J.).

B. Applying the exclusionary rule to governmental decrees would lead to the suppression of far more than driving records.

A ruling in Petitioner's favor is likely to lead to the exclusion of a wide range of governmental decrees. Such decrees might include firearm

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[6] Indeed, the records are relevant precisely because they reflect a current license suspension and a set of past license suspensions ordered by the DMV Commissioner. After all, Petitioner was charged with driving with a suspended license. J.A. 7a (reflecting that Petitioner charged with "[a]ggravated unlicensed operation of a motor vehicle in the first degree" under N.Y. Veh. & Traf. Law § 511(3)(a)(ii)).

licensing decisions, professional licensing decisions, and executive and regulatory orders that make statutory provisions operative. Perhaps even evidence of regulations, prior criminal judgments, or court orders would be implicated.

One illustration is provided by the scenario involving the sex offender discussed in Part II.B, *supra*. Another is as follows. Suppose a Boston police officer witnesses a man arguing with a woman in a way that does not give rise to probable cause. The officer nevertheless detains and secures certain information from the man in what amounts to an unlawful arrest. Upon further investigation, the officer learns that the man is subject to a restraining order prohibiting him from approaching the woman. *See generally* Mass. Gen. Laws, ch. 209A, §§ 3, 7. His approaching her was thus a crime. *Id.* § 7. Should Petitioner prevail, a court might suppress the restraining order despite the fact that the officer witnessed the violator's conduct in the open, the order was in the government's possession previously, and it had all the solemnity and force of a court order.

C. Compelling the exclusion of State governmental decrees would offend State sovereignty and be injurious to federalism.

A governmental decree, such as the suspension order here, is different in kind than evidence traditionally found suppressible. It is nothing like a gun, drugs, a financial record, or a witness statement. A governmental decree does not tend to prove that a defendant engaged in certain

conduct. Instead, it reflects a legal, binding order issued by the State. It has the force of law before any misconduct by police, and it is issued by officials unconnected to the offending officers.

To be sure, exclusion of governmental decrees would result in the same substantial social costs associated with suppressing other evidence. *See supra* Part II.A. But their exclusion would result in unique, and significant, additional costs.

1. This Court has long recognized that the exclusionary rule should not be extended where it would be harmful to the administration of justice or our system of government. For example, the Court has concluded that a defendant himself is not to be suppressed as the fruit of an unlawful seizure, in which case a prosecution against him would be foreclosed entirely. *Crews*, 445 U.S. at 474 & n.20; *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."). As it has observed, the "drastic" step of "barring the prosecution altogether" "might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.'" *Crews*, 445 U.S. at 474 n.20.

Similarly, this Court refused to extend the exclusionary rule to grand jury proceedings in light of the "injury to the historic role and functions of the

grand jury," the "undu[e] interfere[nce] with the effective and expeditious discharge of [its] duties," and the "undu[e] prejudice[]" to "important and historic values" that would result. *Calandra*, 414 U.S. at 349-55 & n.11. Further, this Court's decision that evidence need not be excluded because of a knock-and-announce rule violation was based in part on concerns about the flood of difficult litigation that would be visited upon courts. *See Hudson*, 547 U.S. at 595.

Added to the above, this Court has found that the "costs to . . . values vital to a rational system of criminal justice" outweigh the benefits of allowing federal habeas corpus relief based on a claim that the exclusionary rule was violated in a State prosecution, where the offender had a full and fair opportunity to litigate the claim in State courts. *Stone*, 428 U.S. at 489-95. It suggested that those costs included the "serious intrusions on values important to our system of government" associated with "[r]esort to habeas corpus." *Id.* at 491 n.31. Those values, it observed, include "'(i) the most effective utilization of limited judicial resources, . . . (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.'" *Id.* (explaining that intrusions on such values are generally thought outweighed by the interest in not imprisoning the innocent, but that that interest is usually not implicated with Fourth Amendment claims).

2. Extending the rule as Petitioner seeks would require a State court to exclude evidence of a

valid State governmental decree in a prosecution for violating it. That would effectively render the decree nugatory, at least as to the conduct at issue in the State's prosecution. As in *Stone*, there would be harm to our system of federalism beyond that which arises when other types of evidence are excluded. The harm would occur in two ways.

First, since the Nation's founding, it has been recognized that a State's sovereignty is offended, and comity and federalism are undermined, when a federal court gives no effect to a State's public acts.[7] As this Court has affirmed, "governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts [and] records . . . between [the] State and Federal Governments." *Bute v. Illinois*, 333 U.S. 640, 672 (1948). It would thus be especially offensive to State sovereignty, and injurious to comity and federalism, for this Court to order a State court to give no effect to the State's own public acts and orders.

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[7] *See, e.g., Grove v. Emison*, 507 U.S. 25, 35 (1993) (stating that 28 U.S.C. § 1738, which in large part can be traced back to an act of the First Congress and requires federal courts to give full faith and credit to State legislative acts and judicial records and proceedings, embodies "the elementary principles of federalism and comity"); *University of Tenn. v. Elliott*, 478 U.S. 788, 795, 798-99 (1986) (concluding that "the value of federalism" and unifying purposes would be served by "[h]aving federal courts give preclusive effect to the factfinding of state administrative tribunals" as a matter of federal common law; and noting that § 1738 does not reflect determination to the contrary because it "antedates the development of administrative agencies").

The point is well illustrated by the situation here. Pursuant to its powers to oversee the State's roads and protect the public, the New York State Legislature has enacted certain statutes regulating driving. Those statutes vest the DMV Commissioner with authority to issue binding license suspensions, and they provide penalties for violating his suspension orders. In an exercise of his statutory authority, the Commissioner suspended Petitioner's license, thus prohibiting him from driving. After officers observed Petitioner driving and ascertained that he was thus in violation of the Commissioner's directive, a criminal prosecution was commenced. Evidence of the suspension orders was necessary to that prosecution, not to prove that Petitioner had engaged in certain conduct (*i.e.*, operating a vehicle), but that the State had prohibited him from doing so. Yet with a ruling for Petitioner, federal law would require a State court presiding over his prosecution to treat the Commissioner's suspension orders as though the Commissioner never issued them. That requirement would not even be constitutionally mandated, but based on a Court-created prophylactic rule.[8] Compelling a State to invalidate its own official acts hardly shows respect for its role as a sovereign entity in a system of dual federalism.

Second, a decision in Petitioner's favor likely would force State courts to violate their own separation-of-powers principles. "Separation of

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[8] *See, e.g., Leon*, 468 U.S. at 906 (explaining that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong'" and exclusion is not a "personal constitutional right of the party aggrieved" (alteration in original)).

powers is a bedrock principle to the constitutions of each of the fifty states." Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1190-91 (1999).

The States' adoption of such a principle is entitled to the respect of this Court. It is in part "[t]hrough the structure of its government" that "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). And "[w]hether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate . . . is for the determination of the state." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

Moreover, the value of maintaining separation of powers at both the federal and state levels has long been appreciated. *See, e.g., Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); *The Federalist* Nos. 47 to 51, at 323-29 (J. Cooke ed. 1961) (J. Madison) ("[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."). Indeed, generally speaking, separation of powers is intended to advance the same interests that federalism protects. *See Gregory*, 501 U.S. at 458-59 (explaining that both prevent excesses of power).

Ordinarily, the principle of separation of powers precludes a State court from rendering an

agency decree nugatory where it was not in some way improper. *See, e.g.*, 73 C.J.S. *Public Administrative Law & Procedure* §§ 42, 46-51, at 130-32, 135-41 (2004). Yet that is exactly what this Court would be compelling State courts to do if it rules that evidence of governmental decrees must be excluded.[9] As described above, a State judge would be forbidden from recognizing a valid, legally-binding suspension order issued by the State's executive branch. A sovereign State entitled to govern itself within a federal system should not be forced to act contrary to its own chosen structure of government.

Thus, this Court should at least refrain from requiring the exclusion of evidence of State governmental decrees where they would be rendered partly or entirely nugatory, as here.

CONCLUSION

For the reasons set forth above, the judgment of the New York Court of Appeals should be affirmed.

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[9] Similarly, if a decision for Petitioner were applied by federal courts to exclude federal regulatory decrees, questions could be raised based on federal separation-of-powers principles. Moreover, State-court suppression of federal decrees might raise issues concerning the supremacy of federal law, *see* U.S. Const. art. VI, § 2. And if State courts were to suppress decrees of other States, questions could be raised concerning the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, in addition to principles of federalism.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of New York

BRIEF OF THE NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE, INC. AND THE NEW YORK STATE SHERIFFS' ASSOCIATION [redacted], INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Amici curiae respectfully submit this brief in support of Respondent pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to affirm the judgment of the New York Court of Appeals.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The New York State Association of Chiefs of Police is a not-for-profit organization made up of the most experienced and respected law enforcement officials in the State of New York, including Police Chiefs, Commissioners, Superintendents, Executives, Administrators, and Agents-in-Charge. The Association advances the general welfare of the police profession through the education of its members, and its ultimate goal is to develop a more efficient and effective law enforcement and criminal justice system.

The New York State Sheriffs' Association Institute, Inc. is a not-for-profit corporation, comprising all elected and appointed Sheriffs of New York State. The Institute's goals include the education and training of Sheriffs and their staffs, so that the public is well served by the Sheriffs of New York State.

Amici have a strong interest in the outcome of this case, as they seek to ensure that law enforcement is not unnecessarily handicapped by the

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are being filed with the Clerk's Office.

suppression of evidence in circumstances where the purposes of the exclusionary rule would not be served. Based on *Amici*'s familiarity with the training of officers and officers' purposes in making traffic stops, there would be no practical benefit in excluding evidence of documents previously in the government's possession.

SUMMARY OF THE ARGUMENT

Petitioner seeks to dramatically expand the exclusionary rule, to cover not only evidence acquired as a result of a Fourth Amendment violation, but also evidence already in the government's hands—*i.e.*, public records establishing that Petitioner's license was suspended. Law enforcement is properly barred from using ill-gotten evidence from unlawful stops or searches, but that principle does not extend to depriving the government of evidence already lawfully in its possession.

Extending the exclusionary rule to evidence already in the government's possession will accomplish nothing in deterring Fourth Amendment violations, but will come with substantial costs. Any purported benefits are illusory because there is no reason to believe that officers are stopping people, without cause, for the purpose of comparing their identity against databases in hopes of finding some violation. To the contrary, officers are trained to stop vehicles only in compliance with Fourth Amendment requirements, and there is no incentive for them to do otherwise. Indeed, the potential loss of evidence from an unlawful stop dwarfs any potential gain from simply learning someone's identity.

In contrast, the cost of excluding evidence, particularly evidence already in the government's possession, is substantial. There is, of course, the usual cost of exclusion, *i.e.*, potentially important evidence is suppressed even though it could help the jury determine the truth. Here, though, there is an additional harm because exclusion of government records essentially leads to immunity from prosecution, in that those records may be essential—as they are here—to prove the case. This kind of immunity is not the proper function of the exclusionary rule, and certainly cannot be justified given the lack of any benefit in applying the rule here.

Furthermore, Petitioner's proposed expansion of the exclusionary rule departs from established exclusionary rule principles. The doctrine by its terms prevents use of fruit of the poisonous tree; this does not mean that the government also must throw out fruit that is already, so to speak, in its refrigerator. Indeed, this Court has made clear that the rule does not apply to evidence already in the government's possession, and Petitioner does not directly contest this point. Petitioner argues that the government did not possess the DMV record here in a "meaningful sense," but this "meaningful sense" test is both unjustified and dangerously open-ended.

ARGUMENT

1. PETITIONER'S PROPOSED EXPANSION OF THE EXCLUSIONARY RULE IS NOT JUSTIFIED BY THE DETERRENT PURPOSES OF THE RULE AND WOULD IMPOSE SUBSTANTIAL COSTS.

Based on the serious costs of excluding potentially crucial evidence, this Court has narrowly confined the exclusionary rule to circumstances in which its benefit in deterring unlawful police behavior outweighs the substantial societal costs of exclusion. For this reason, the Court has consistently refused expansions of the exclusionary rule in a variety of contexts. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (knock-and-announce violations); *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998) (parole hearings); *United States v. Leon*, 468 U.S. 897 (1984) (good-faith search based on warrant); *Nix v. Williams*, 467 U.S. 431 (1984) (evidence that would have been inevitably discovered); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings); *Stone v. Powell*, 428 U.S. 465, 493 (1976) (habeas corpus proceedings). Likewise, here, any expansion of the exclusionary rule to evidence already in the government's possession fails under any plausible cost-benefit analysis.

This Court has long made clear that "suppression is not an automatic consequence of a Fourth Amendment violation." *Herring v. United States*, 129 S. Ct. 695, 698 (2009). Indeed, suppression "has always been" this Court's "last resort, not [its] first impulse." *Hudson*, 547 U.S. at 591. As this Court has "consistently recognized," the "unbending

application" of the exclusionary rule "would impede unacceptably the truth-finding function[]" of our criminal justice system. *Leon*, 468 U.S. at 907 (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

Thus, a Fourth Amendment violation justifies applying the exclusionary rule only "where its deterrence benefits outweigh its substantial social costs." *Hudson*, 547 U.S. at 591 (internal quotation marks omitted). This follows from the purpose of the exclusionary rule, which "is *not* to redress the injury to the privacy of the search victim," but rather "is to deter future unlawful police conduct." *Calandra*, 414 U.S. at 347 (emphasis added). Accordingly, only when the rule's deterrent value can overcome the "substantial cost on the societal interest in law enforcement" is its application warranted. *United States v. Janis*, 428 U.S. 433, 448 (1976). There is, as a result, "no way to avoid making an empirical judgment" when deciding whether a particular Fourth Amendment violation should trigger the exclusionary rule. *Leon*, 468 U.S. at 927 (Blackmun, J., concurring). And here, that empirical judgment weighs firmly against the rule's application.

A. Extending the Exclusionary Rule to Public Records Already in the Government's Possession Would Have No Deterrence Benefits.

There would be no deterrence benefit in expanding the exclusionary rule to cover evidence already in the government's possession. Petitioner direly warns of police officers intentionally stopping citizens without cause to check their identities

against databases, but this possibility has no grounding in reality or common sense. Even though courts have long refused to exclude evidence from databases already in the government's possession,[2] there is no evidence of the specter raised by Petitioner. To the contrary, the practice in New York State, with which *Amici* are well acquainted, is to do everything reasonably possible to prevent unlawful stops from occurring.

Petitioner fundamentally misunderstands both the incentives of law enforcement and the considerable safeguards against the suspicionless stops of which Petitioner warns. The police's primary objective in law enforcement is preventing crimes from occurring, stopping crimes in progress, and gathering evidence of crimes; it is not to check individuals' names against public records. When assessing whether applying the exclusionary rule would have the requisite "significant effect in deterring" Fourth Amendment violations, *Herring*, 129 S. Ct. at 701, this Court has always recognized that there is little deterrence benefit when the evidence at issue is outside the police officers' primary objective. Specifically, if "the imposition of the exclusionary rule" in a new fashion "falls outside the offending officer's zone of primary interest," then such an expansion "is unlikely to provide significant,

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[2] *See, e.g.*, *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009); *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *Hoonsilapa v. INS*, 575 F.2d 735, 737 (9th Cir. 1978).

much less substantial, additional deterrence." *Janis*, 428 U.S. at 458.

For example, when declining to apply the exclusionary rule to parole proceedings, this Court emphasized that a police "officer's focus is not upon ensuring compliance with parole conditions or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes." *Scott*, 524 U.S. at 368. Accordingly, "even when the officer knows that the subject of his search is a parolee, the officer will be deterred from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials." *Id.* Expanding the exclusionary rule into parole proceedings was unlikely to increase deterrence, for such proceedings "fall[] outside" officers' "zone of primary interest." *Id.* (quoting *Janis*, 428 U.S. at 458); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984) (noting potential deterrent value of exclusionary rule in civil deportation proceedings, because "arresting officer[s'] primary objective, in practice, will be to use evidence" in such proceedings).

Likewise, here, the DMV records are outside the police officers' "zone of primary interest." The primary objective of officers, as this Court has recognized, is "searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial." *Scott*, 524 U.S. at 367. Their main purpose is *not* to compare individuals' names to DMV and other public records. As a result, when the police learn from public records that, for example, an individual happens to have a suspended driver's license, it is a purely incidental discovery,

and not the reason for the stop. Whether those records might later be suppressible is therefore unlikely "to alter the behavior of law enforcement officers." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

Moreover, as in *Scott*, there is substantial deterrence regardless of the exclusion at issue. Specifically, the officers' actions are already shaped by the risk that any evidence they collect might be suppressed in a criminal trial. Thus, regardless of whether public records are suppressible, an officer "would be foolish" to engage in suspicion-free searches, for "[b]y doing so, he would risk suppression of all evidence" found during the search. *Murray v. United States*, 487 U.S. 533, 540 (1988). Petitioner and *amici* have given no reason "to assume that any specific disincentive already created by the risk of exclusion of evidence" collected during the search would be meaningfully "enhanced if there were the further risk" that public records consulted during the search might also be excluded. *Stone*, 428 U.S. at 493. Rather, just as "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," *Calandra*, 414 U.S. at 351, the same is true for the use of evidence already in the government's possession.

In addition to the exclusionary rule's existing impact on all evidence obtained based on an unlawful stop, suspicion-free stops are deterred by the risk of civil suits. *Hudson*, 547 U.S. at 596-98. Individuals whose Fourth Amendment rights are violated by state or federal officers can sue those officers for damages. *See* 42 U.S.C. § 1983; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,

403 U.S. 388 (1971). And certainly any policy of unlawful stops would raise a real risk of civil liability. When declining to extend the exclusionary rule to violations of the Fourth Amendment's knock-and-announce requirement, this Court assumed that the threat of "civil liability [was] an effective deterrent" of such infractions already. *Hudson*, 547 U.S. at 598 (noting risk of both civil damages and attorneys' fees). Petitioner offers no reason why this assumption should not apply with equal force here.

Furthermore, there are extensive police training and discipline programs designed to prevent Fourth Amendment violations, including unlawful vehicle stops. In New York, for example, nearly every government officer with police powers is legally required to complete a training program that teaches individuals' Fourth Amendment rights in detail. *See* N.Y. Gen. Mun. Law § 209-q; N.Y. Exec. Law § 846-h.[3] Supervisors are required to undergo additional training that includes monitoring subordinate officers to ensure that they do not violate Fourth Amendment rights. *See* N.Y. Gen. Mun. Law § 209-q(1)(a). There is simply no practice in New York State to allow, let alone encourage, unlawful stops for the purpose of learning a driver's identity and examining DMV records. Petitioner presents no facts to the contrary.

More generally, there is no evidence to suggest that officers throughout the country are engaging in stops with an eye toward using identity evidence

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[3] The few exceptions are largely individuals, such as certain Attorney General investigators, with police powers by law but no uniformed presence.

even if the stop is deemed unlawful. Indeed, this Court has repeatedly noted strong evidence that police do respect Fourth Amendment rights, and relied on this evidence as an important factor in denying the need for exclusion. This Court has praised "the increasing professionalism of police forces, including a new emphasis on internal police discipline," with "increasing evidence that police forces across the United States take the constitutional rights of citizens seriously." *Hudson*, 547 U.S. at 598-99; *see also id.* at 603 (Kennedy, J., concurring) (noting "procedures for training police offices and imposing discipline for failures to act competently and lawfully"); *Krull*, 480 U.S at 352 n.8 (refusing "to assume" government actors' "indifference to the constitutionality" of their actions). This focus on Fourth Amendment rights is unsurprising, for the "[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability." *Hudson*, 547 U.S. at 599 (citing *Canton v. Harris*, 489 U.S. 378, 388 (1989)). And while this "attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, . . . it does reduce the likely deterrent value of the exclusionary rule." *Lopez-Mendoza*, 468 U.S. at 1045.

In short, expanding the exclusionary rule to cover public records is unlikely to have any deterrent effect on Fourth Amendment violations. Any such violations are already substantially deterred by the existing exclusionary rule, the threat of civil liability, and internal training and discipline programs.

B. Extending the Exclusionary Rule to Public Records Already in the Government's Possession Would Carry Substantial Costs.

As against the minimal benefits of exclusion here, the costs are particularly large. Petitioner's proposed expansion of the exclusionary rule would preclude the police from using public-records evidence already in their possession, not only impeding the truth-seeking function of our criminal justice system, but also—because such records are the only way to prove crimes such as Petitioner's—guaranteeing that certain guilty individuals go free. Petitioner's expansion would also generate increased litigation costs by introducing the exclusionary rule into an entirely new class of cases, where the police collect no new evidence but instead simply consult relevant public records to determine whether an individual has committed a crime. None of these costs is justified by the insignificant deterrence gains that Petitioner's expansion might achieve.

This Court has always made clear that any benefits of the exclusionary rule come at a steep cost. "Because the exclusionary rule precludes consideration of reliable, probative evidence," the rule "undeniably detracts from the truthfinding process and allows many who would otherwise be [convicted] to escape the consequences of their actions." *Scott*, 524 U.S. at 364; *see also Stone*, 428 U.S. at 490 ("Application of the rule thus deflects the truthfinding process and often frees the guilty."). Indeed, "often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." *Stone*, 428 U.S. at 490 (internal quotation marks omitted).

The cost of deeming such evidence off limits is particularly striking here, where the public records at issue are already in the government's possession and are genuinely essential to prove the crime. Unlike other crimes that might be provable in many ways, it is impossible to establish beyond a reasonable doubt that an individual has driven with a suspended driver's license without relying upon the public record of the suspended license. Not only does "this evidence alone establish[]" the defendant's guilt, *id.*, but it is *only* this evidence that can do so.

Applying the exclusionary rule here would therefore amount to a grant of criminal immunity, far more than is normally the case with the exclusionary rule. As this Court has explained, such immunity is not a legitimate function of the exclusionary rule. Specifically, when a defendant "challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." *United States v. Crews*, 445 U.S. 463, 474 (1980) (plurality opinion). The reason is that a defendant "is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." *Id.* Thus, the already "grave" costs of the exclusionary rule are particularly troubling with respect to Petitioner's proposed expansion, which would essentially grant immunity for certain crimes whenever an unlawful stop identifies the defendant.

Moreover, Petitioner's proposed expansion would affect a significant number of cases. It would include

every situation in which the police, in light of their existing records and knowledge, connect someone to a crime solely by learning that person's identity. This applies not only to the instant case, but also to cases where the police discover that an individual is a felon, and thus prohibited from possessing a firearm, or a past sex offender, and thus required to register with local authorities. *See, e.g.*, 18 U.S.C. § 922(g); 42 U.S.C. § 16911 *et seq.* Excluding public records in these circumstances could effectively grant immunity for crimes far more severe than driving with a suspended license.

Moreover, expanding the exclusionary rule in such a sweeping fashion would substantially burden the courts. "[T]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded." *Hudson*, 547 U.S. at 595 (quoting *Scott*, 524 U.S. at 366). Such issues have, to date, been wholly foreign to cases in which the police simply consult existing public records in order to enforce crimes. On Petitioner's view, though, the exclusionary rule would take on sudden importance in such cases, by becoming a new means through which defendants can exclude public and conclusive evidence of their guilt. This would likely create "a constant flood" of alleged Fourth Amendment violations in a new class of cases—a "considerable" cost to the courts that must be justified. *Id.*

In contrast, the limits of the current exclusionary rule are easy to enforce. The rule applies to all evidence obtained during or as a result of a Fourth Amendment violation (subject to certain exceptions), but not to any evidence already in the government's

possession at the time of the violation. Administering this bright-line boundary is "not . . . difficult" and does not require "a substantial expenditure of judicial time." *Leon*, 468 U.S. at 924.

In sum, Petitioner has not provided any reason for this Court to take the drastic step of expanding the exclusionary rule, with all its attending costs, without any plausible gains in deterrence.

II. BECAUSE THE DMV RECORD WAS NOT OBTAINED AS A RESULT OF THE SUPPOSEDLY UNLAWFUL STOP, IT IS NOT SUBJECT TO THE EXCLUSIONARY RULE

For nearly a century since this Court adopted the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), the rule has applied only to evidence obtained as a result of a constitutional violation. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. . . . Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).[4]

The exclusionary rule has never been applied to evidence already in the government's possession at

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[4] *See also, e.g.*, *Weeks*, 232 U.S. at 393 ("The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises.").

the time of the supposedly unlawful search or seizure. "The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was *in official hands prior to any illegality*." *Crews*, 445 U.S. at 475 (emphasis added).[5] In *Crews*, the police unlawfully stopped, arrested, and took a picture of the defendant. *Id.* at 466-67. The picture was not allowed into evidence, because it was created during the unlawful seizure, but the witness' in-court identification of the defendant was held not to be barred by the exclusionary rule. This Court recognized that "most [exclusionary rule] cases begin with the premise that the challenged evidence is in some sense *the product of illegal governmental activity*," and the "Court of Appeals' application of that premise to the facts of this case"—disallowing the in-court identification—was "erroneous." *Id.* at 471 (emphasis added). In short, because the in-court identification was not a "product of illegal government activity," it should not be excluded.

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[5] Although this section of the opinion was for a plurality, the other Justices would have gone even further. Two Justices refused to join this section because they would have "reject[ed] explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest." *Crews*, 445 U.S. at 477 (Powell, J., concurring in part, joined by Blackmun, J.). Likewise, three Justices would have expressly rejected the idea that "a defendant's face can be considered a suppressible fruit of an illegal arrest." *Id.* at 479 (White, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.). In any event, this reasoning was adopted—indeed, quoted in full—by a majority of the Court in *Maryland v. Mason*, 472 U.S. 463, 471 (1985).

Other cases have likewise recognized that the exclusionary rule is inapplicable to evidence already in government possession at the time of the unlawful conduct. In *Maryland v. Macon*, 472 U.S. 463 (1985), the police paid for a supposedly obscene magazine, then arrested the seller and took back their payment. The Court held that even assuming "that the warrantless arrest was an unreasonable seizure in violation of the Fourth Amendment . . . it yielded nothing of evidentiary value that was not already in the lawful possession of the police" because "the magazines were *in police possession before the arrest*, and the $50 bill, the only fruit of the arrest, was not introduced in evidence." *Id.* at 471 (emphasis added).

Similarly, in *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), approved and discussed in *Crews* and *Davis v. Mississippi*, 394 U.S. 721, 725 (1969), fingerprint evidence in the police's possession was held admissible despite an unlawful arrest. Specifically, the fingerprints taken during the unlawful arrest were "suppressed as 'something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention.'" *Crews*, 445 U.S. at 476 (quoting *Bynum*, 262 F.2d, at 467). However, "Bynum was subsequently reindicted for the same offense, and the Government on retrial introduced an older set of his fingerprints"; the Court of Appeals held that "the fingerprint identification made on the basis of information already in the FBI's possession was not tainted by the subsequent illegality and was therefore admissible." *Id.* (citing *Bynum v. United States*, 274 F.2d 767, 767 (D.C. Cir. 1960) (per

curiam)). Thus, fingerprint evidence already in the government's possession at the time of the unlawful stop could not be suppressed.

Petitioner does not really dispute the principle that the exclusionary rule is inapplicable to evidence already in the government's possession. Indeed, in the fingerprint cases upon which Petitioner relies—*Davis*, 394 U.S. 721, and *Hayes v. Florida*, 470 U.S. 811 (1985)—the police generated the fingerprints during the defendant's unlawful detention. *See Davis*, 394 U.S. at 722-23; *Hayes*, 470 U.S. at 812-13.

Instead of denying that possession is dispositive, Petitioner argues that "the [DMV record] information was not possessed by law enforcement in any meaningful sense until the police unearthed it as a result of their unlawful conduct, and, for that reason, the independent source doctrine does not apply." Pet'r Br. at 30. This argument fails on two separate grounds.

First, the conclusion of the argument—that the independent source doctrine is inapplicable—has no relevance here. The independent source doctrine provides that where the "acquisition of evidence" was made unlawfully, the evidence can still be allowed if "the Government learned of the evidence from an independent source." *Segura v. United States*, 468 U.S. 796, 805 (1984) (internal quotation marks omitted). Here, though, the point is that the evidence was not acquired unlawfully in the first place. *See Crews*, 445 U.S. at 471 ("most [exclusionary rule] cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity"). Thus, regardless of whether

the government's records should be considered an independent source, the exclusionary rule does not bar evidence already in the government's possession.

Second, Petitioner's invention of a "meaningful sense" caveat for possession would create an unjustified and unworkable expansion of the exclusionary rule. Petitioner cites no precedent—indeed, there is none—requiring possession in a "meaningful sense." And for good reason: actual possession is sufficient to make exclusion inapplicable. The rationale for the exclusionary rule is that the government should not be able to introduce evidence that it obtained unlawfully. But this rationale does not apply to evidence the government possessed in the first place.

Petitioner contends that the government learned of the importance of the evidence only due to the supposedly unlawful stop (*see* Pet'r Br. at 35-36), but the same was true for the in-court identification in *Crews* and the fingerprint records in *Bynum*. In *Crews*, the court below had reasoned that "but for respondent's unlawful arrest, the police would not have obtained the photograph that led to his subsequent identification by the complaining witnesses and, ultimately, prosecution of the case." 445 U.S. at 469. Nonetheless, the Court explained that this effect of the unlawful arrest was irrelevant:

> [B]efore they approached respondent, the police had already obtained access to the 'evidence' that implicated him in the robberies, *i.e.*, the mnemonic representations of the criminal retained by the victims and related to the police

> in the form of their agreement upon his description. In short, the Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp. Rather, respondent's unlawful arrest served merely to link together two extant ingredients in his identification.

Crews, 445 U.S. at 475. Thus, an unlawful stop that "serve[s] merely to link" evidence already in the government's possession does not give rise to exclusion of that evidence.

Likewise, in *Bynum*, the significance of the fingerprints at the scene of the crime was not established until the unlawful arrest gave the government Bynum's own fingerprints. *See Bynum*, 262 F.2d at 467 ("There is no indication that the arresting officer had information concerning the circumstances of any crime except that a particular car was wanted and had been seized in connection with a robbery. So far as now appears, he did not even know what robbery was involved, much less any of the alleged circumstances, and made no inquiry before arresting the visitor."). In short, the in-court identification in *Crews* and the fingerprint records in *Bynum* were not possessed in any more of a meaningful sense than were the DMV records here.

Furthermore, because the term "meaningful" is far from self-defining, a "meaningful sense" test would be unworkable. Does the evidence need to be in the arresting officer's hands? In the police department's evidence locker? What about evidence held by a neighboring police department? There is no

principled way to distinguish between these different forms of possession.

Petitioner's proposition that the exclusionary rule should cover the government's acquisition of an understanding of the *import* of evidence, rather than the being limited to its acquisition of the evidence itself, would create even more problems. Courts cannot plausibly determine whether and how the prosecution in a given case would have used certain evidence, already in its possession, but for some information it gained from police misconduct. Certainly, the court can stop the ill-gotten information from being presented at trial. But there is no reliable means of discerning how that information might have affected the prosecution's understanding of the crime, and therefore the way it chooses to present other evidence.

Simply put, a "meaningful sense" test is not only out of step with precedent and the purposes of the exclusionary rule; it also provides no rule capable of practical application by the courts.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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